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# Environmental Contaminants Board of Review

Report on:

## OUTSIDE REVIEW and PUBLIC PARTICIPATION

This is the Second Report of the PCB Board of Review which was established as a result of objections to proposed Chlorobiphenyl Regulations published in the Canada Gazette - Part 1 on December 2, 1978.

July 1980

## **ERRATA**

**The following line should read:**

p.19, line 19 - entering their environments"

**Enclose these words with square brackets:**

p.27, last quote, line 8 - not

p.68, quote, lines 5 & 6 - the Ministers

p.87, quote, line 5 - independence

p.88, quote, line 5 - the board



ENVIRONMENTAL CONTAMINANTS ACT

PCB BOARD OF REVIEW

1302-200 Rideau Terrace  
Ottawa, Ontario  
K1M 0Z3

21

The Honourable John Roberts, P.C., M.P.  
Minister of the Environment

and

The Honourable Monique Bégin, P.C., M.P.  
Minister of National Health and Welfare

Dear Ministers:

The Board of Review has the honour to present the Second Report of the Board dealing with Outside Review and Public Participation, under the Environmental Contaminants Act and related legislation wherever relevant.

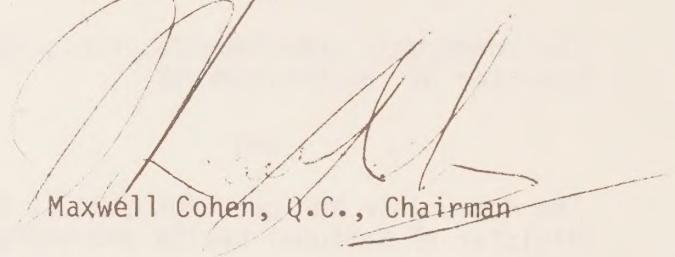
While the mandate of the Board was to concentrate essentially on improvements in the procedures dealing with boards of review such as notices of objection and their withdrawal, last minute changes in regulations and public hearings under the Act, the Board found it necessary to explore directly related areas of the problem of outside review and public participation.

The Board believes that the Report will provide suggestions for improvements in procedures that do not require amendments to the Act, while other recommendations will need changes in the legislation.

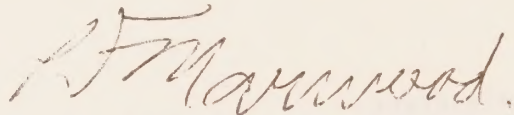
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Finally, the Board wishes to express its appreciation to all the individuals and organizations who cooperated so conscientiously in replying to a complex questionnaire, the effects of which are in evidence throughout the Report. In addition, the Board wishes to thank all officials of your Department who participated in this inquiry and to commend them for their efforts. The Board also wishes to mark the contribution of Professor Edward Ratushny of the Faculty of Law, University of Ottawa, for his research and counsel as well as his major contribution to the drafting process, and of Dr. Hazen Thompson of Environment Canada for the continuing devotion shown to his duties as executive secretary to the Board.

Yours sincerely,

A large, stylized handwritten signature in dark ink, appearing to read 'Maxwell Cohen'.

Maxwell Cohen, Q.C., Chairman

A handwritten signature in dark ink, appearing to read 'L.F. Marwood'.

L.F. Marwood, P.Eng., Member

A handwritten signature in dark ink, appearing to read 'R.B. Sutherland'.

R.B. Sutherland, M.D., Member

PCB Board of Review



## ENVIRONMENTAL CONTAMINANTS ACT

### BOARDS OF REVIEW

### OUTSIDE REVIEW AND PUBLIC PARTICIPATION

#### The Second Report of the PCB Board of Review

July 1980





## PREFACE

A preface, said the distinguished Canadian historian, Chester Martin, is the first page to be read and the last to be written. While his neat aphorism is often apt, these few lines have germinated in the minds of the PCB Board of Review throughout its studies and deliberations leading to the drafting of this Second Report. The Report, therefore, is a progeny of the marriage of the narrow mandate to improve the operations of future boards of review and the (implied) broader undertaking to determine the place of public consultation, and 'outside' reviews within the environmental regulatory systems now developing federally and provincially.

It is very easy to take the high road of public conscience demanding opportunities to challenge authority as politicians and public servants go about the daily business of managing affairs and making decisions. Certainly any view of the democratic process that is worth supporting must encompass the growing public desire for increased popular participation in government as well as broader designs for bureaucratic accountability.

But the high road has its price as well as its gains. Delays, monetary costs, the intrusion of special interest groups that range from the very self-centered to the very responsible, all must be balanced with even-handed attention if the system is to be fair to all and, more important, if it is to be seen to be fair.

Cutting across this right to be heard, and the right to review decisions that may be harmful to some and costly to others are the contemporary anxieties about economic constraints and other impediments to decision-making when the times may be out of joint for the full satisfaction of all "legitimate" claims -- if complete satisfaction ever is attainable.

What is examined in this Report, therefore, amounts to the 'nuts and bolts' of an improved board of review mechanism under the Environmental Contaminants Act. But this is placed in the context of some general overview, however limited, of public participation in governmental rule-making in the environmental arena, as well as the related issues of fairness to all interests including the funding of those who wish to be heard but cannot afford the price of admission. Yet a preface cannot do more than seduce the reader to turn the pages -- and they must tell their own tale.





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## SUMMARY OF COMMENTS, CONCLUSIONS AND RECOMMENDATIONS

### CHAPTER I

#### BACKGROUND AND INTRODUCTION

In this Chapter, the Board explains the mandate which it has received to study the independent review process under the Environmental Contaminants Act as well as its more general significance. The Board outlines the manner in which it has proceeded in developing this Report. A description is given of the steps involved in the making of a regulation (under this Act). In addition, a brief survey is provided of a variety of mechanisms which exist at the federal level to permit public participation in the development of regulations. The structure of the Report is described covering the four chapters that follow.

### CHAPTER II

#### EXISTING LEGISLATIVE FRAMEWORK

#### (WHAT BOARDS MUST CONSIDER IN THEIR OPERATIONS UNDER THE EXISTING ACT)

##### 1. General

In this Chapter, under headings which follow, the Board offers its views as to what should be done by boards of review, or what is required of them, under the existing legislation.



## 2. Any Person Having An Interest

Section 5(3) of the Act provides that, "any person having an interest therein" may file a notice of objection to a proposed regulation.

It appears to the Board that a broad interpretation of this phrase is desirable but returns to this matter in Chapter IV. The word "interest" should not be restricted to a pecuniary or proprietary interest but should extend to the interests of health or of representative organizations in the environmental field. (p.22).

## 3. Notice of Objection

Under Section 5(3) of the Act the Ministers are required to appoint a board of review when a "notice of objection" has been filed. No formality is required in relation to the notice of objection other than the expression of an intention to object. (p.23).

Presently, when a notice of objection has been filed, an informal procedure has been adopted to clarify, and possibly dispose of, the issues raised by the notice. This informal procedure when properly executed, is in the public interest but it obviously has its dangers, since it may be viewed as bargaining levers between the parties. (pp.23-25).

The Board believes that once a board of review has been appointed, it must proceed to carry out its mandate under the Act even though the objection might be subsequently withdrawn. (pp.25-26).

#### 4. Role of a Board of Review

A board of review must not only "inquire into the nature and extent of the danger posed by the substance" in question but must also inquire into "methods of controlling the presence in the environment of the substance" -- as stated in the Environmental Contaminants Act. The Board believes that the scope of inquiry of a board of review is not restricted to the nature of the notices of objection filed. (p.29).

A board of review is not a direct decision-making body although a proposed regulation referred to it, because a notice of objection has been filed, cannot become law until the board has reported. The board studies and recommends. It is the Ministers that ultimately make what is a policy - political decision. (p.31).

#### 5. Alterations to Proposed Regulations

A problem may arise where, following the inquiry and report of a board of review, the Ministers may decide to alter the order or regulation or to alter an amendment thereto, so that it becomes different from the one that was originally proposed and published in the Canada Gazette pursuant to Section 5(2).

Where the change involves a material modification the central question would be whether the proposed change arose out of the board of review hearings where full opportunity had existed for the making of representations and the presentation of evidence in relation to that change. Where such opportunity had been provided, the failure to

publish anew -- the sixty-day rule -- would not affect the validity of a changed regulation (in the case of a new regulation) or a changed amendment subsequently adopted by the Ministers. (pp.33-34).

### CHAPTER III

#### ADMINISTRATIVE AND PROCEDURAL CONSIDERATIONS

##### (WHAT BOARDS MUST CONSIDER EVEN WITHOUT LEGISLATIVE GUIDANCE)

#### A. ADMINISTRATIVE MATTERS

##### 1. Relationship with Government

The Board believes that the feature of a board of review most crucial to its role is the board's freedom and independence from the government officials responsible for developing the proposals under review. A board must, therefore, maintain an arm's length relationship with government departments so that its independence will not only exist in fact, but also will be so seen by the public to exist. (p.36).

At the present time, the responsibility for providing boards of review under the Environmental Contaminants Act with the resources necessary to fulfill their mandate, falls upon Environment Canada. It is generally desirable that public servants of Environment Canada or Health and Welfare Canada not be seconded to boards of review to provide support services. The Board recommends that future boards of



review make a point, at the outset, of discussing administrative and funding procedures with senior departmental officials and coming to a full understanding. (p.40).

## 2. Executive Secretary

The appointment of an executive secretary should be a first priority of a board of review established under the Act since the executive secretary will assume responsibility for all other administrative matters as discussed. (p.41).

It is particularly important that the executive secretary make whatever arrangements are necessary to 'get the job done'. Where departmental facilities may be inadequate or unavailable because of other priorities, the executive secretary should arrange to obtain the necessary services from the outside as required through contractual arrangements. To have an effective link with the departments, each Deputy Minister should appoint a "facilitator" to provide 'know-how' in the relations of the board to the departments. (p.42).

## 3. Preliminary Executive Meetings and Publicizing of Operations

A priority consideration for preliminary executive meetings will be the appropriate publication of press and Gazette notices of the board's operation and hearings. It may be desirable to have professional press relations personnel available to the board. (p.45).

#### 4. Translation, Printing, Submission, Publication and Distribution of Report

While a board submits its report to the Ministers, the responsibility for translation, printing, publication and distribution falls upon the Government which must bear in mind the thirty-day rule for publication under the Act. (p.46).

Section 6(5) specifically recognizes that a board may suggest to the Ministers that the public interest would be better served by the withholding of publication of its report. Such recommendations should be made only under unusual circumstances. Similarly it would be appropriate for a board to recommend withholding of publication in part only. (p.47).

In its First Report, this Board issued an Interim Report which proved to be expeditious and problem-free. Nevertheless, the Board cautions future boards against adopting this approach except for appropriate situations. (p.48).

The Board recommends that future boards of review consider adopting the joint arrangement by the Board and the Ministers of a press conference for the release of their reports, as for the First Report. (p.49).

#### B. PROCEDURAL CONSIDERATIONS

While board of review procedures should follow a basically similar pattern, those adopted by a particular board may depend, in part, upon the nature of the issues before it and the positions taken by those presenting evidence and making representations. Procedures

must not be an end in themselves but the means to an end. They should, therefore, be characterized by sufficient flexibility to permit the discretion and good judgment of the chairman to prevail yet be sufficiently stable to permit everyone to know what to expect (p.52).

The Board believes that it is vital to the integrity of a board that its procedures be characterized by a general spirit of "fairness" and be seen to be so. (p.52).

Proceedings should, generally, be characterized by informality where possible. However, that informality should give way to more formal procedures where necessary to the conduct of the inquiry. The Board is of the view that proceedings should be permitted to shift from the informal to the formal but the following should be considered as fundamental conditions to the acceptability of this kind of flexible approach: (1) the necessity for adequate public notice of every hearing whether formal or informal; and, (2) the necessity to maintain a full transcript of the proceedings no matter how informal they might be on any particular occasion. (p.53).

The Board has developed a general "code" representing guidelines to cover most of the significant procedural issues which future boards might face. These guidelines are submitted for consideration for adoption in whole or in part by future boards of review. (pp.54-57).



## CHAPTER IV

### ADMINISTRATIVE AND LEGISLATIVE CHANGES

#### (RECOMMENDATIONS TO GOVERNMENT TO IMPROVE THE BOARD OF REVIEW SYSTEM)

In this Chapter, the Report makes a number of specific recommendations for improvements to the board of review process.

#### A. ADMINISTRATIVE CHANGES

Under this heading the Board recommends initiatives which might be pursued by the Ministers without resorting to legislation.

##### 1. Composition of Boards

The Board believes that three is an ideal number for board membership although a larger panel may be considered to be appropriate in exceptional circumstances. (p.65).

The Board agrees that boards of review should normally be composed of a chairman possessing the skills of the legal profession, and of experts in the scientific and technical, medical or environmental fields. However, the Board observes that the role of chairman requires experience in the conduct of hearings. Such skills may also be found in persons with professional qualifications outside of the legal profession. (pp.60-61).

A key factor which must be considered in the selection of board members should be their actual and perceived impartiality. Difficulties often can be avoided by the appointment of persons not

identified with any special interests. Each board member must exercise objective judgment and not act as an "industry representative" or "public interest representative" or, indeed, represent anything but his or her own skill and impartial judgment. (pp.61-64).

The Board recommends that the Ministers prepare and maintain on an ongoing basis, a list of potential board members so that each appointment could be made expeditiously when the need arises. The Ministers should welcome recommendations from a wide range of sources as to persons who should be maintained on such a list. (p.65).

The Board observes that in some cases the existing government regulations in relation to the remuneration of board members may not be appropriate, and a balance needs to be drawn between standard rates and paying the 'going-rate' for expertise. (pp.66-67).

## 2. Conflict of Interest Guidelines

Conflict of interest guidelines should be established and brought to the attention of potential appointees at the time the appointment is offered. Appointments should be accepted with assurances from the appointee that no conflict exist at that time and on the understanding that any future conflict will be avoided during the term of the appointment. (pp.67-68).

## 3. Use of Advisory Committees

The Act seems to contemplate a role for advisory committees pursuant to Section 3(4) beyond what has yet been realized in practice. (p.71).

The function of the advisory committee is to collect and assess data as well as, possibly, to shape control measures, all leading to the formulation of regulations. Its contribution should be made before government officials have developed commitments to control strategies or the need for them. By contrast the board of review process is concerned with the review of the control policies afterwards as specifically proposed by government as being appropriate. (p.71).

The Board recommends that the Ministers consider the use of Section 3(4) of the Act on every occasion when a new regulation is being contemplated and giving such advisory committees a broad mandate. As a catalyst to action in this respect, the Board recommends that Environment Canada officials propose a draft of regulations governing committee operations as contemplated by Section 18(j) of the Act. (p.72).

#### 4. Distribution of Reports

The Board recommends that a comprehensive list of appropriate recipients be developed and maintained for the purpose of receiving future reports of boards of review and also for the purpose of selecting persons or groups for consultative and notice purposes from time to time. (p.73).

The Board also recommends that arrangements be made for transcript and documents of board of review proceedings to be available for examination by the public even after the final report has been submitted. (p.73).



## B. LEGISLATIVE AMENDMENTS TO THE PRESENT ACT

### 1. General

In this Part, the Report suggests specific amendments which might be considered in relation to the Environmental Contaminants Act itself. Here the Board returns to each of the specific problem areas referred to in Chapter II as well as a number of additional areas where legislative changes are considered appropriate. (p.74).

### 2. Any Person Having An Interest

While recommending in Chapter II the appropriateness of a liberal interpretation for this phrase, nevertheless in order to avoid the possibility of a restrictive interpretation, the Board recommends that the legislation be amended to read "any interested or knowledgeable person". (p.75).

The Board also recommends that provision be made to enable the Ministers to establish a board of review on their own initiative even when no notice of objection has been filed. (p.75).

### 3. Notice of Objection

Although, as stated in Chapter II, no formality is required in relation to notices of objection the Board recommends that the Act be amended specifically to require that a person filing such a notice state, generally, the reasons for the objection. (p.76).

The Board recommends that the Act also be amended to provide that where the Ministers consider that a notice of objection may be frivolous, it be referred to the chairman of the last constituted board of review for determination as to the validity of the notice of objection. (p.78).

The Board also recommends that the Act be amended to provide specifically for the withdrawal of notices of objection prior to the establishment of a board of review and thus avoid the need to create a board in such circumstances. (p.78).

#### 4. Role of a Board of Review

The Board recommends that Section 6(2) of the Act be rewritten to include Section 3(3)(a)(v) so that the entire mandate of boards of review be readily ascertainable from a reading of one section of the Act. (p.79).

#### 5. Alterations to Proposed Regulations

In view of the ambiguity discussed in Chapter II with respect to alterations in proposed regulations the Board recommends that the Act be amended to include a provision which would clearly eliminate the need to publish material modifications where these have arisen as a result of representations made at public hearings and during the course of the inquiry of a board of review. (p.83).

Such a provision should also be published in the Canada Gazette together with proposed regulations so that members of the

public may be aware that the proposals might be modified as a result of board of review hearings without further notice. (pp.83-84).

#### 6. Regulations Respecting Procedures

The Board recommends that Section 18 of the Environmental Contaminants Act be amended to permit the making of regulations respecting the procedures to be followed by boards of review. (p.85).

#### 7. Provision Where Board Members Are Unable to Continue to Serve

The Board recommends that the Act be amended to provide that an inquiry may be completed and a report submitted by the remaining board members in the event that a board member is unable to proceed for reasons of health or otherwise. In addition, the remaining members should have the option of requesting that the Ministers appoint a replacement for the member who has become incapacitated. (pp.85-86).

#### 8. Time for Publication of Report

The Board recommends that Section 6(5) of the Act be amended to change "thirty days" to "thirty working days". (p.86).

#### 9. Withholding of Publication of Report

The Board recommends that Section 6(5) be amended to provide clearly that a board of review may recommend to the Minister that its report be withheld in part only. (p.86).

### C. OTHER MATTERS

In this Part the Report refers to issues which require consideration beyond the purview of the Ministers referred to in the Act.

#### 1. Administrative Independence of Boards

Pursuant to the discussion in Chapter III and bearing in mind the crucial importance of independence, the Board believes that common support services and funding procedures separate from the Department should be developed through the grouping together of a variety of permanent and ad hoc bodies which conduct public hearings similar in form. A common 'pool' of executive secretaries, general secretarial assistance, transcript services, financial services, information services, and so on, might be developed at a considerable saving to the taxpayer. (pp.88-89).

#### 2. Uniformity in Public Consultation

The Board believes that it may now be appropriate for the Department of Justice, perhaps in conjunction with the Privy Council Office, to conduct a comprehensive review of public consultation processes in relation to regulation-making powers. (p.90).

#### 3. Funding of "Public Interests" Representation

The Board supports the principle of "public interest" funding and believes that there is a clear need for an interdepartmental examination of the problem of subsidizing "public interest" representation. (p.93).



CHAPTER VTHE BOARD OF REVIEW PROCESS: ITS PLACE AND ITS FUTURE(A FRESH APPROACH TO OUTSIDE REVIEW AND PUBLIC PARTICIPATION)

In this Chapter the Board considers an alternative to the existing process, particularly in relation to the problem that the board of review may come too late and the "advisory committee" too early to be fully satisfactory as mechanisms for public consultation. (pp. 98-99).

The Board believes that it would be preferable to provide for a public hearing process at a much earlier stage in the making of regulations than presently may occur through boards of review. If such an approach is adopted the scope and function of a board of review at the end of the sequence might be substantially reduced. (p.103).

While this general approach might be achieved in a variety of ways, the board has advanced a specific model for consideration in order to provide a coherent and concrete context for this general conclusion -- with the aim of a more effective public hearing and review process before regulations become law. (pp.103-107).

The Board believes that in the absence of a general federal policy toward public review and participation some broad study is required to assure opportunities for a public role in environmental and consumer regulation-making, e.g. nuclear licensing, waste disposal of hazardous products, pesticides and food additives. A policy-legal-administrative inquiry now seems timely as a companion to the current study of the Economic Council of Canada on the nature and cost of regulation. (pp.110-111).

## CHAPTER I

### BACKGROUND AND INTRODUCTION

#### 1. First Board of Review

The PCB Board of Review was appointed on November 1, 1979 pursuant to Section 6 of the Environmental Contaminants Act, Statutes of Canada 1975, Chapter 72 (Appendix A), to inquire and report in relation to proposed amendments to Chlorobiphenyl Regulations No.1. The report, described as the First Report, was submitted to the Ministers on February 25, 1980, and made public on March 26, 1980.

In the course of its inquiry, the Board was invited by the Government of Canada to consider and to report on the lessons learned from its activities in carrying out its responsibilities as the first Board of Review established under the Act. This additional mandate was proposed in the following prepared statement, presented to the Board by Mr. R.M. Robinson, Assistant Deputy Minister, Environmental Protection Service, Environment Canada, at the Board's public hearings on December 10, 1979:

Mr. Chairman, as you are aware this is the first occasion on which a Board of Review has been established under the authority of the Environmental Contaminants Act. You are also aware that the sequence of events following the appointment of yourself and the other two distinguished members to this Board is not a series of events addressed clearly by the legislation.

I would request, therefore, that the Board of Review include in your report those observations and suggestions which may be readily and quickly drawn from your experiences with the vagueness of the legislation encountered during the course of

of your executive meetings and this hearing. Your observations and suggestions could prove invaluable as advice for future courses of action taken by the government. These actions could include establishment and guidance of future Boards of Review and amendment of the legislation.

There are, in particular, two areas in which your comments and suggestions would be most valued. The first of these areas relates to the manner in which notices of objection considered to be frivolous might be dealt with without establishing a Board of Review. The second area of concern pertains to the course of action that should be taken in the situation where a Board is constituted and all Notices of Objection are withdrawn or the objectors fail to appear.

In closing this statement I wish to thank the Board for the opportunity to make this request.

This statement had been given to the Board in advance by letter dated December 7, 1980 (Appendix B).

The Board accepted this additional mandate, which it has viewed as involving, essentially, two aspects. The first is to offer advice and guidelines for future boards of review which might be established under the Act. The second is to offer advice in relation to the development of new legislation. (The specific areas referred to in the third paragraph of Mr. Robinson's statement fall within both of these broader aspects.)

The Board has given careful deliberation to this additional dimension of its role. Such a role is not contemplated by the Act. Nevertheless, it appeared to the Board that the Government had taken a wise and practical approach in seeking to take maximum advantage of the "unique" experience of this, the first, Board.



However, the distinct nature of this additional mandate led the Board to the conclusion that it should be treated separately from the Board's role as contemplated by the Act. The Board decided, therefore, to issue two separate reports. The first report, under the Act, would be issued as quickly as possible while the second would allow further time for reflection. At the proceedings on December 10, 1979 and March 13, 1980, Mr. Robinson agreed that this would be a sensible approach. (Transcript, December 10, 1979, pp.196-197 and transcript, March 13, 1980, pp.1-4, Appendix C).

While the Board recognized that its mandate in relation to the second report referred to matters which might be 'readily and quickly drawn' from its experience, the Board believed that for its recommendations to be of any significant value, either to future boards of review or to government officials in developing legislative amendments, its experience should be supplemented by professional advice and public consultation. With the full cooperation of Environment Canada, the Board was able to retain the services of a lawyer, experienced in Administrative Law, as Counsel to the Board. However, a dilemma presented itself in relation to public consultation.

The Board took the view that in relation to its Second Report, it was neither required nor desirable that it hold public hearings. On the completion of its First Report on proposed amendments to Chlorobiphenyl Regulations No. 1, the Board's formal role requiring public hearings as announced in the Canada Gazette had terminated. The new mandate, therefore, was, in the opinion of the Board, much more in the nature of a consultative-advisory-research activity than it was of a review-public hearing nature. Nevertheless, the large policy issues involved in such a study of the Board's role and procedures opened the

door to important questions with broad implications. Thus, while no public hearings were contemplated for the reasons mentioned above, the public clearly had an interest in what the Board was doing. The Board was of the view that, certainly, the part of the public most directly concerned should have an opportunity to set out its opinions on the main problems dealing with the board of review process and related matters.

The Board, therefore, decided to prepare and send out a questionnaire (Appendix D) to a wide range of public interest, industrial, academic and other sectors or persons known to be concerned with these matters. (See Appendix E for list of addressees). The Board considered the questionnaire approach to be more appropriate to the consultative- advisory-research function which was involved. Although public hearings were not held, the Board did not rule out, initially, the possibility of individual or group meetings with respondents to the questionnaire, depending upon the nature of the replies and bearing in mind the public interest in this exercise not being prolonged unduly. In the event, however, no such interviews took place.

Many of the replies to the questionnaire have, in fact, provided the Board with valuable insights and suggestions and it is grateful to those who responded to the request on relatively short notice. The replies which have a bearing on this report are included in the appendices. (See Appendix F). In addition, the Board has relied upon its own studies and on information and views obtained through the cooperation of officials from Environment Canada, Health & Welfare Canada, and other agencies and departments of government at both the federal and provincial levels as well as information on views and practices in the United States, particularly those of the Environmental Protection Agency. Such views were obtained both informally, and at formal proceedings which were fully recorded.

## 2. The Making of a Regulation

The board of review procedure is but one of many steps in the making of a regulation under the Environmental Contaminants Act. The regulation-making process which has been developed since the passage of the Act in December, 1975, is described briefly below in order that the board of review procedure may be viewed in relation to the other steps in the overall process as it presently exists, and to give some perspective of the opportunity provided for consultation and public input prior to the enactment of the final regulation. No formal description of the regulation-making process exists at present, but such a statement is currently being developed for eventual interdepartmental approval.

### a) Initiation of Proposed Regulation

A decision as to the need for an order or regulation involves:

- (i) the postulation that a hazard exists as the result of the importation, manufacture or use of a chemical;
- (ii) the gathering of information from published reports, from research, from industry or from other sources as to potential health or environmental effects;
- (iii) an assessment of the potential hazards; and,
- (iv) the development of a strategy for elimination or control of the chemical.

### b) Preliminary Selection of Potentially Hazardous Substances

The Department of the Environment/National Health and Welfare Environmental Contaminants Committee determines which potentially hazardous substances should be investigated, the types of information required and the hazard posed by a given substance or class of

substances. This standing Committee is composed of two senior officials from the Department of the Environment and two from the Department of National Health and Welfare. The Committee may establish subcommittees or task forces, which may include members from outside the federal government, to gather information and assess the degree of hazard to human health or the environment, as required. However, the usual procedure is for the Committee to refer the information-gathering and assessment steps to the Early Warning System within the Contaminants Control Branch of the Department of the Environment if a threat to the environment is suspected, or to the Health Protection Branch in the Department of National Health and Welfare if a potential hazard to human health may be involved.

Alternatively, or additionally, an advisory committee may be appointed jointly by the Ministers of the Environment and National Health and Welfare under Section 3(4) of the Environmental Contaminants Act to receive representations from interested persons and concerned members of the public, to collect data and conduct investigations, and to review data respecting the importation, manufacture and processing of a substance or class of substances in excess of a specified quantity following publication in the Canada Gazette. Such advisory committees are required to advise the Ministers regarding measures to control the presence in the environment of the substance or class of substances referred to them.

Following receipt of the reports of the Contaminants Control Branch, or of the Health Protection Branch, or of any task forces or subcommittees which may have been appointed, a decision is made by the DOE/NHW Environmental Contaminants Committee as to whether the substance or class of substances should be added to the List of Priority Chemicals.



c) List of Priority Chemicals

Inclusion of a substance or class of substances in the List of Priority Chemicals is dependent upon its meeting two of the three following criteria:

- (i) Toxic Effects - the assessment of information in the reports described above leads to the conclusion that the substance could cause adverse effects on health or the environment.
- (ii) Bioaccumulative Effects - the assessment of information leads to the conclusion that the substance or its transformation products could translocate and accumulate to significant concentrations in air, water, soil, sediments or biota.
- (iii) Commercial Flow Patterns - the assessment of information leads to the conclusion that the importation, manufacture or processing of the substance could result in it entering into the environment in potentially harmful quantities or concentrations.

Substances or classes of substances may be added to the List of Priority Chemicals at any time. Additions to the List may be published in the Canada Gazette from time to time, and the complete List is published annually, together with information as to the status of the chemical within the investigation-assessment process at the time of publication. The List comprises three categories of priority:

Category I - chemicals which are being considered for regulation.

Category II - chemicals which are being investigated in depth.

Category III - chemicals for which further information is needed.

A substance may move from Category III to Category II or Category I as information is received and assessed. Such changes in category are also published in the Canada Gazette. The public is therefore informed as to the possibility of impending regulations or other control measures respecting certain chemicals on the List.

d) Strategy Development

Following the investigation-assessment steps, a decision is made as to the need, if any, for control measures and the strategy to be recommended for ensuring such control. The latter may vary from guidelines to formal codes to control orders or a regulation. The chosen instrument emerges in due course from further study and discussions departmentally and interdepartmentally leading ultimately to a Ministerial decision.

e) Offer to Consult

Before a chemical or class of chemicals can be added to the Schedule of substances which may be controlled under the Environmental Contaminants Act, or before any regulation can be made or amended, the Minister of the Environment is required under Section 5(1) of the Act to offer to consult with the provincial governments and with any departments or agencies of the federal government that are likely to be affected by the proposed order or regulation. The offer to consult at the federal level is made through the Federal Interdepartmental Committee on Environmental Contaminants (FICEC), a committee which was established to facilitate the consultative process required under Section 5(1) of the Act. FICEC ensures that economic, technological, social and geographical factors are taken into consideration before any action is taken to schedule or regulate a substance. The provincial Ministers and FICEC representatives have a statutory thirty days to accept the offer to consult.

#### f) Socio-Economic Impact Analysis

In accordance with a Cabinet directive issued in August, 1978, a preliminary socio-economic impact analysis (SEIA) must be conducted before publication of a proposed regulation, to ensure that the hardships which may result from enactment of the regulation do not outweigh the benefits. A draft of the proposed regulation is usually prepared before initiating a SEIA, as a basis for the analysis. The preliminary SEIA determines whether it is to be a major or a minor status regulation.<sup>1</sup> Regulations which could have an economic impact of ten million dollars in any twelve-month period must undergo a full analysis because these are classed as major status regulations. SEIA's are carried out by the Planning, Policy and Analysis Branch of the Department of the Environment.

#### g) Development of Proposed Order and Regulations

Using the results of the provincial and federal government consultations and the findings of the SEIA, the proposed regulations are prepared by the Department of the Environment in consultation with the Department of National Health and Welfare and the regional offices of the Environmental Protection Service. The proposed draft is subject to revision by the Departmental Legal Advisor, then to examination by the Legal Advisor of the Privy Council Office to ensure that the regulation complies with the requirements of Section 3(2) of the Statutory Instruments Act, S.C. 1970-71-72, c.38 .

<sup>1</sup> See Mr. Seaborn's letter to the Board, June 13, 1980, for a description of government policy in relation to SEIA's. (Appendix G). (See also infra p.42, footnote).

#### h) Ministerial Notice

Following clearance by the PCO's Legal Advisor, the proposed order and regulations, together with a notice and a summary of the Socio-Economic Impact Analysis are sent to the office of the Minister of the Environment for his approval and signature -- in accordance with the usual procedures preceding publication in the Canada Gazette. At the same time, an information package containing the same documentation is sent to the Department of National Health and Welfare.

#### i) Publication in Canada Gazette, Part I

Before the proposed order and regulations are recommended to the Governor-in-Council, Section 5(2) of the Environmental Contaminants Act requires that they be published in the Canada Gazette, Part I. A summary of the Socio-Economic Impact Analysis is published now as a matter of policy simultaneously with the proposed order and regulations. Section 5(3) of the Act provides a sixty-day waiting period within which any person having an interest may file a notice of objection with the Minister. If a valid notice of objection is filed then a board of review must be appointed. This stage is fully discussed in the next chapter and is a major part of the present report. If no notice of objection is received within the sixty-day waiting period, the final order and regulation are forwarded to the PCO's Legal Advisor for formal processing, as required by the Statutory Instruments Act.

#### j) Preparation of Recommendations to the Governor-in-Council

Upon receipt of the order and regulation, approved by the Legal Advisor to the PCO, recommendations to the Governor-in-Council, which consists of the Governor-General acting on the advice of his Ministers, are drafted, and, together with the order and regulations, are sent to the Minister of the Environment for his approval and signature, then to the Minister of National Health and Welfare for his approval and signature.



#### k) Governor-in-Council

The final order and regulations, to be made by the Governor-in-Council under the Environmental Contaminants Act, must first be endorsed by the Committee of the Cabinet (comprising at least four Cabinet Ministers). They are then presented to the Governor-General whose seal is impressed, making the order and regulations a statutory document.

#### 1) Registration and Publication in Canada Gazette

The Clerk of the Privy Council then causes the order and regulations to be published in Part II of the Canada Gazette pursuant to the provisions of the Statutory Instruments Act.

### 3. Mechanisms for Public Participation -- An Overview

The board of review process under the Environmental Contaminants Act is merely one example of attempts to provide appropriate opportunities for the public to make representations in relation to certain laws created by the Government through the exercise of its regulation-making powers. Moreover, there may be an increasing tendency to rely upon public hearings as the mechanism for such public consultation. The implications of the board of review process, therefore, extend well beyond the example and application of the Environmental Contaminants Act.

Under that Act, it is provided that the Government may not make certain regulations unless, sixty days in advance, it formally publishes its intention to do so. If no objection is filed within that period of time, the regulation may be made. However, if a notice of objection is filed, and not withdrawn, the Government must appoint a board of review to conduct an inquiry and make a report. The regulation may not be made until after the board has reported. The very

broad object of this process is, perhaps, reflected in the following passage from Mr. R.M. Robinson's presentation to the Board on April 14, 1980:

...certainly this is the view we have been expressing internally within the government that there should indeed be a greater opportunity for various interested parties to become involved in some appropriate way in the decision-making that is a part of regulation development. In other words, it is not just an information gathering exercise. They ought to be able to seek to influence decisions. (Transcript, p.109).<sup>1</sup>

There is a related benefit in what might be described as the educational 'spin-offs' of the process. It can serve to educate the public as to the parameters of the problem being addressed and the limitations upon the responses which are available so that exaggerated fears or expectations may be reduced. Both the consultative and educational benefits may be taken to form the rationale for the board of review process.

There exists, federally, a whole range of informal and formal procedures for obtaining representations from the public in relation to regulation-making. At one end of the spectrum, of course, is the naked power to create regulations without any obligation whatsoever to consult or even to reveal what is contemplated until it is a fait accompli. However, even where such obligations are not imposed by law,

<sup>1</sup> A copy of the transcript has been included in the appendices only when considered helpful to show the context in which the quotation occurred.

there are frequent instances of the development of informal consultative procedures. For example, the Food and Drug Directorate of Health and Welfare Canada has established a practice of circulating proposed regulations to all of those on a developed mailing list by way of a periodic newsletter. Representations are then made directly to departmental officials by an industry association or by particular companies where there are competing interests -- all leading to the final departmental decision in the making of a regulation.

The Clean Air Act, R.S.C. 1970, c.C-47 provides only that proposed regulations must be published in the Canada Gazette before they may come into force. However, the Act is silent with respect to the manner in which representations from the public are to be made or received. In practice, submissions are received informally and in writing. On the expiration of the sixty-day period, the Government is at liberty to bring into force the regulations in question.

A recent bill, Bill C-25 (an Act to promote safety in the transportation of dangerous goods), imposed no time limit but was explicit in requiring that an opportunity be provided to make representations. Although it died on the Order Paper of the last Session of Parliament it provided:

21(1)...a copy of each regulation that the Governor-in-Council proposes to make under section 20 shall be published in the Canada Gazette and a reasonable opportunity shall be afforded to interested persons, to make representations to the Minister with respect thereto.

However, no procedures were included in the Bill for the making of such representations.

The Hazardous Products Act, R.S.C. 1970, c.H-3 provides for boards of review which are similar to those under the Environmental Contaminants Act. Nevertheless, there are significant differences. Under the Hazardous Products Act, there is no delay in the coming into force of a regulation pending the board of review process. Rather, the request for the establishment of a board of review must be made within sixty days of the enactment of the regulation which remains in force throughout that period, and during the life of the board if one is established.

The board of review process under the Environmental Contaminants Act is, therefore, but one form of consultation that has been established in relation to regulations which have been proposed or enacted<sup>1</sup>. At the same time, in comparison to the other processes described above, it imposes the most onerous of conditions. The Government may be compelled by law to establish a board of review and it may be prohibited by law from enacting a regulation until that board has reported. (The Act, nevertheless, does make provision for emergency situations -- see Section 7(3)).

#### 4. The Structure of the Report

In the next chapter, the Board examines the existing legislative framework for the operation of boards of review, the scope of their role and certain problems created by the provisions and omissions

<sup>1</sup> The Board's attention was drawn to Bill C-25 (an Act to amend the Radiation Emitting Devices Act) introduced on May 5, 1980 and dealing with similar problems.

of the Act. Some of these problems may be described as technical and "legalistic" and, indeed, were so described by some of the questionnaire respondents. However, that is not a reason to ignore them. The Board believes that it has an obligation squarely to meet these issues with a view to alerting future boards at the outset as to the difficulties which may be faced and how these might be resolved.

In Chapter III, the Board surveys a number of administrative, largely internal, matters with which almost every board will have to deal. In addition, the Report outlines a number of procedural considerations which may be of assistance in the conduct of future public hearings.

In both of these chapters, the Board has been conscious not only of the position of Government and future boards of review, but also of persons who might wish to make representations to such boards. If the Report has erred on the side of stating the elementary, it may be observed that frequently it is the omission of the obvious which may create uncertainty and confusion. Moreover, if this Report does state the obvious, future boards are free to reject comments and suggestions as they see fit.

Chapter IV is addressed primarily to the Minister of the Environment as the Minister responsible for initiating changes in relation to the Environmental Contaminants Act. In this chapter, the Report considers those improvements that might be made to the existing process through three different approaches, namely: administrative policies and practices; legislative amendments to the existing Act; initiatives requiring interdepartmental perspectives and policies.



In Chapter V, the Board has examined possible legislative changes from a much broader perspective. The fundamental question asked here is: What kind of process of public consultation would be most desirable in relation to regulation-making with respect to environmental protection if government were to design an entirely new system? Such a program to enlarge the public participation role might be influential in many other areas of legislation having a broad social impact.

## CHAPTER II

### EXISTING LEGISLATIVE FRAMEWORK

#### 1. General

Under the Environmental Contaminants Act, a series of steps is contemplated prior to the stage where the Ministers (of the Environment and National Health and Welfare) propose to recommend to the Governor-in-Council that an order and/or regulations be made. Once that stage has been reached, Section 5(2) provides that the Minister of the Environment shall publish a copy of the proposed order and regulations in the Canada Gazette. Section 5(3) provides that:

Any person having an interest therein may, within sixty days of publication in the Canada Gazette ... file a notice of objection with the Minister.

Section 6(1) provides that upon receipt of such a notice of objection, the Ministers "shall establish an Environmental Contaminants Board of Review". It, therefore, becomes significant to consider the two preliminary questions raised by Section 5(3), namely, what is the meaning of "Any person having an interest therein" and what constitutes a valid "notice of objection"? These questions are dealt with in the next two sections of this chapter.

In the subsequent sections, the Board discusses additional problems of statutory interpretation of the Act as it relates to boards of review. In section 4, the Board considers the "Role of a Board of

Review", i.e. the scope of their mandate under the Act. In section 5, the Board examines the problem created by "Alterations to Proposed Regulations" following publication in the Canada Gazette.

## 2. Any Person Having an Interest

The phrase "any person having an interest therein" was the subject of considerable discussion before the Parliamentary Committee which considered the Environmental Contaminants Act prior to it receiving third reading and becoming law. (Minutes of Proceedings and Evidence of the Standing Committee on Fisheries and Forestry, Friday, June 27, 1975). There, the Legal Advisor to the Department of the Environment pointed out that the courts very often construe the word "interest" as being restricted to a proprietary interest. Thus, in order to file a notice of objection, a person would have to have some pecuniary or proprietary interest beyond that of the average citizen.

A member of the Parliamentary Committee introduced an amendment to the bill which would broaden the category of persons permitted to file a notice of objection by adding the phrase "or any concerned member of the public". The Legal Adviser to the Department pointed out that the section had been deliberately restricted in order to limit the necessity of establishing boards of review:

The reason for saying "an interest" in the first one is that if we were to put in "concerned members of the public", then it would always be necessary for the Minister to appoint a board, no matter who had filed a notice of objection. It might be somebody who really knew nothing about the subject and they would file a notice of objection and simply say, "I am concerned" and then automatically the Minister would be obliged to appoint a board.

This, of course, could be under certain circumstances a terrible waste of the tax payer's money. A board would have to be set up, even though there was no real reason for it, simply because somebody had exhibited a concern...

In support of the amendment it was argued that:

It would allow access of the public as well as the industry. And I do not think the Minister has any reason to fear the public. We have an informed public today. We have many organizations that are interested in the environment that now have scientific and excellent staff, research people who can assist laymen in the community to make responsible presentation.

However, the then Minister, The Honourable Jeanne Sauvé, P.C., M.P., suggested that the amendment was unnecessary because, in fact, she would give a very broad meaning to the phrase "person having an interest". She indicated that it would encompass "ordinary citizens who have a clear interest in the substance entering their environments and, in response to a specific question, stated that there was no doubt that public interest groups such as Pollution Probe and SPEC would be included. The amendment was defeated.

<sup>1</sup> Canada. Thirtieth Parliament. First Session. Standing Committee on Fisheries and Forestry. Respecting: Bill C-25, An Act to Protect Human Health and the Environment from Substances that Contaminate the Environment. Friday, June 27, 1975. Issue No.42, p.20.

It remains to be seen whether the courts will interpret the phrase, "person having an interest" as broadly as the Minister of the day indicated she would.

The questionnaire response which was received from Pollution Probe - Ottawa, rather surprisingly, took a narrow view of the scope of the phrase in question:

Only a person having a pecuniary or other interest greater than that of the general citizen can, by notice of objection, trigger the establishment of a Board of Review. (Appendix F-1).

It is to be noted that in preparing its response, this organization had the assistance of Mr. Charles S. Alexander who was the Legal Adviser to the Department of the Environment referred to in the proceedings quoted above. In contrast, a number of responses suggested that the phrase would bear a much broader interpretation. The Public Interest Advocacy Centre stated:

Those whose health may be adversely affected may well have a valid interest along with those whose property or business might be affected. The National Energy Board and CRTC, for example, recognize interests which are not pecuniary in nature and their decision to do so has been upheld by the courts. (Appendix F-2).

Similarly, British Columbia Hydro and Power Authority took the position that:



The conditions in Section 5(3) of the Act identifying an objector as a person "having an interest" must be very liberally interpreted. It could be a company involved in manufacture objecting to regulations which are too stringent, or it could be a citizen group concerned about health aspects and objecting to regulations not being stringent enough. (Appendix F-3).

Officials of Environment Canada have also taken the position that a broad approach should now be given to the phrase in question:

...we have recognized a reality and that reality is that over time the courts appear to be interpreting that kind of idea ever more broadly and governments are too, and rightly so...the interrelationship between an action by government or a failure to act and the effects on the citizens that has given rise to this ever broader interpretation of the rights of the citizen to question what has gone on and therefore to take on the rights that at one time were usually given to people who had, to use your term, pecuniary or proprietary interest. (Mr. Robinson, transcript, March 13, 1980, pp.70-71, Appendix H).

It was also pointed out to the Board that in the French version of Section 5(3), the phrase is simply, "Tout intéressé", which probably supports a broader interpretation.

The significance of this discussion is, of course, that if the Minister decides that a person who has purported to file an objection does not fall within the category of a "person having an interest" a board of review need not be established. The comments and views expressed above may be of some assistance to persons contemplating the filing of an objection in future.

In the event that a Minister should refuse to establish a board of review on the basis that the person filing the objection does not have the status required by Section 5(3), it is possible that the Minister's decision could be challenged in the courts. It is also possible for a board of review, itself, to be challenged in the courts to prevent it from proceeding on the basis that the person filing the objection did not satisfy the requirement of Section 5(3). Thus, it is conceivable that the Minister's decision could be open to attack on the basis that he construed the opening phrase of Section 5(3) too narrowly (as in the first situation) or too broadly (as in the second). The Board is of the view that a broad interpretation of the phrase in question is desirable but returns to this matter in Chapter IV.

### 3. Notice of Objection

The second issue raised by Section 5(3) is the question of what constitutes a valid "notice of objection". The Pollution Probe-Ottawa response expressed the view that certain conditions should be read into the Act in relation to the notice of objection. It stated:

It is not sufficient to the validity of a notice of objection for it to say you are doing too much or not enough. The objector must (1) either attack the validity of the perception that a significant danger exists or (2) attack the measures proposed as inadequate or unwarranted to deal with the significant danger and (3) state the reasons why in either case. (Appendix F-1).

A contrary view was expressed by The Public Interest Advocacy Centre:

A valid notice of objection is any piece of paper submitted by any person which says simply that that person objects to the Minister's proposal (Appendix F-2).

This latter view received support from a number of other respondents, including the Canadian Manufacturers' Association and Mr. E. Czerkowski, an environmental consultant. Indeed, it is difficult to find any support whatsoever, in the statute, for the proposition that a notice of objection need specify any grounds or satisfy any criteria. The Board is of the view that under the existing legislation, a notice of objection need only indicate that it is intended to be an objection, pursuant to Section 5(3), to the order or regulation which has been proposed. Once a "person having an interest" conveys that to the Minister, then it must be assumed that a proper notice of objection has been filed under Section 5(3) and the Ministers are compelled by law to establish a board of review pursuant to Section 6(1).

Nevertheless, the officials of Environment Canada have adopted an informal procedure, upon receiving a notice of objection, which has no basis under the Act but a sound foundation in common sense. It is the practice for officials of the Environmental Protection Service to consult with the objector to ensure that the proposed order and the objection are understood. In the words of Mr. Robinson this approach is taken:

...to make clear that we understand the content of the objection, that we see what prompted it and also to be sure that the objector himself understands what he is objecting to. It may sound rather simplistic but it may not surprise you to know how many objections have vanished into thin air as a result of that process, but I would say the great majority. (Transcript, March 13, 1980, pp.76-77, Appendix I).

Another possible result of such discussions could be for the Minister to become aware of implications of the proposed order or regulation which had not been envisioned. Amendments might be made. If such amendments involve a "material" modification, they, as with the original regulation or amendment, would now have to be published in the Canada Gazette pursuant to Section 5(2).

In the view of the Board, this informal procedure is not, by itself, subject to criticism. It is a reasonable and pragmatic approach which may eliminate unnecessary boards of review where a notice of objection has been withdrawn prior to the appointment of a board. It is reasonable and in the public interest for the Ministers to treat this situation, where a board had not yet been appointed, as if a notice of objection had not been filed.

At the same time, it is obvious that the board of review process may at times represent to departmental officials a significant expense and a delay in the making of orders and regulations which they consider to be urgent and desirable. It is, therefore, important to avoid any temptation which might present itself to officials to be unduly flexible in accommodating special interests. That such temptations may present themselves is illustrated in the following example provided by Mr. Robinson:

In a particular substance that we were planning to take action on, a company did in fact file a notice of objection and really questioning the whole basis of what we were doing...the president came and called on the Minister, or the vice-president, where we had a very vigorous discussion. I think I had to restrain one of the scientists at one point and the company in a very gentle kind of way let it be known that the notice of objection would be readily withdrawn if we undertook not to explore other avenues of use of this particular substance.

The response of the department in this instance was unequivocal:

...needless to say we not only did not accept that deal but gave our Minister a letter, a vigorous letter in response, in which he...stated what we planned to do which was to vigorously pursue this area... (Mr. Robinson, transcript, March 13, 1980, pp.89-91, Appendix J).

This response was, of course, completely proper and the Board has no reason to believe that the conduct of departmental officials in these discussions has ever been anything but impeccable. Nevertheless, the danger exists and representatives of both government and industry should be fully conscious that the board of review process is not to be viewed as some sort of bargaining lever.

What is the situation where the notice of objection has been withdrawn after a board has been appointed? This Board found itself in that very situation and, in spite of a contrary view originally expressed by officials of Environment Canada, concluded that it should proceed to conduct an inquiry and report under the Act. (See First Report, pp.2-3).



The brief of The Public Interest Advocacy Centre has expressed well the Board's view on this issue:

Once a Board of Review has been established, it is difficult to see how the initiating notice of objection could be withdrawn. This is because section 6(2) seems to give rights to people who may not have had rights before the establishment of the Board. That section provides that the person filing the notice of objection "and any other interested or knowledgeable person" shall be given a reasonable opportunity of appearing before the Board. Withdrawing the notice of objection would deprive these other interested or knowledgeable persons of their right to appear before the Board. (Appendix F-2).

This area was one of the two which the Board was specifically asked to explore by the Government in the prepared statement referred to earlier and which is the springboard for this Second Report. The Board also returns to this area in Chapter IV.

The second area which the Board was specifically asked to examine relates to "the manner in which notices of objection considered to be frivolous might be dealt with without establishing a Board of Review". The Environmental Contaminants Act has no provision to deal with an objection which might be classified as "frivolous". Nevertheless, if a purported notice of objection were obviously frivolous in nature, it might well be reasonable for the Ministers to conclude that it did not constitute a "notice of objection" as contemplated by the Act. In those circumstances, their position would be, simply, that a notice of objection had not been filed so that a board of review need not be appointed. Again, the Board returns to this problem in Chapter IV.

#### 4. Role of a Board of Review

On a very general plane, it is apparent that the board of review process provides a forum where persons may officially offer their comments upon a specific order or regulation which the Government proposes to bring into force. At the same time, the presentation of information by such persons and by government officials may have a general educative effect upon the public. In that very general context, what is the proper scope of activity of a board of review? What limits are there upon the range of the inquiry which it will conduct?

A great variety of responses were received in relation to the question of the role which was envisioned for boards of review under the Environmental Contaminants Act. The following is a sampling:

- British Columbia Hydro and Power Authority:

Upon review of the Act, the objective in establishing a Board of Review appears to be to obtain an independent assessment of hazards and methods of controlling hazardous substances in the environment. In order to assess the methods of control, the hazards of the substance under review must be understood. Therefore, the emphasis should not be on independently assessing the hazards, but on understanding the hazards and then doing an independent review of the methods of control, with considerations for economic, social and environmental impact. (Appendix F-3).

- The Canadian Manufacturers' Association:

In our view the Boards of Review under this Act have a very restrictive role, namely to give someone who objects to a proposed regulation a chance to obtain a second opinion as to whether the substance in question is an environmental contaminant that should be regulated under the Environmental Contaminants Act...the role of the Board should not extend to commenting on the regulation the Minister has proposed and to recommending how the substance should be controlled in the public interest.

and:

...to enable anyone affected by a regulation proposed under the Environmental Contaminants Act to object that the substance the regulation aimed to control was not actually a contaminant, as described in the Act, and therefore should not be controlled by the Act... The Board was not set up to determine whether or not the regulation is in the public interest. (Appendix F-4).

- Ontario Hydro:

It is our opinion that the Board of Review was established to impartially evaluate the soundness of the proposed regulation. In this sense, the Board has a wide sphere of influence. (Appendix F-5).

- The Public Interest Advocacy Centre:

...the Board must ask itself - what is the nature and extent of the danger posed by the substance?... The Board of Review process provides an opportunity for the orderly expression of differences of view-point with respect to the relative safety of a substance... There is still room for disagreement within the scientific community on many relevant matters. The Board of Review process ensures that anyone who may be affected by a proposed order or regulation is given an opportunity to present whatever evidence he may have which tends to challenge the position of the Department. (Appendix F-2).

Since the board of review is a creature entirely of statute, its authorized activity must be found in its legislation. The main section is 6(2), which provides:

A Board shall inquire into the nature and extent of the danger posed by the substance or class of substances to which any proposed order or regulations or proposed regulations referred to it under subsection (1) apply... (Emphasis added).

These words, in themselves suggest a very narrow scope of inquiry. However, they must be read with the remainder of the sub-section, which adds: "...and in particular shall inquire into the matter described in subparagraphs 3(3)(a)(i) to (v)....". The first four of these subparagraphs do not expand the scope of inquiry defined by the opening words of Section 6(2). They are all directly related to "the nature and extent of the danger posed".

However, subparagraph 3(3)(a)(v) is much broader. It speaks of: "...methods of controlling the presence in the environment of the substance...". In the view of the government, the role of the board of review would vary depending upon the nature of the situation which is involved:

Now in these sorts of situations the Board would be expected in, say, the first case, to review the nature and extent of the danger as it applied to the requirement for the specific regulation under challenge. In the second case one would be reviewing the technical feasibility of the regulation and refer to the nature and extent of the danger solely for the purpose of general information. In the third case the Board would wish to satisfy itself on the economic burden imposed by the regulation and to determine if the economic burden appears justified against the need for regulation...And in the fourth case, which I guess is the broadest, to review the nature of the proposed regulating strategy together with the nature and extent of the danger, which is very broad indeed. (Mr. Robinson, transcript, March 13, 1980, pp.17-18, Appendix K).

However, Mr. Robinson was also of the view that, in each case, the recommendations of a board should reflect the board's opinion as to the specific nature of the objection.

There are difficulties associated with this view. The first is that, as explained earlier, the notice of objection need not specify the grounds upon which the objection was filed. Moreover, Section 6(2) also provides that the Board:

...shall give the person filing the notice of objection and any other interested or knowledgeable person a reasonable opportunity of appearing before the Board, presenting evidence and making representations to it. (Emphasis added).

Such other person might well present views and evidence on issues quite different from those contemplated by the person filing the notice of objection. As the Chief of Legal Services, Environment Canada, put the matter to the Board:

Once an objection is filed... it opens the door for many other people to come in...so that you cannot confine yourself to the reasons or grounds of the objection. It opens up the door very wide and the Board has to take into account all those people and what views they have. (Mr. Prabhu, transcript, March 31, 1980, pp.34-35).

A board of review should not in normal circumstances regard itself as a full scale Royal Commission. The problem is to achieve the proper balance depending upon the subject matter.

There are no easy answers to be found in the language of the existing Act. Rather the answer must be fashioned from the collective good judgment and common sense of each board as established. Boards should recognize at the outset that they are under no obligation to



'reinvent the wheel'. Reasonable chairmen and members of boards will strive to crystallize and define the issues and thus to limit the scope of the proceedings to evidence and representations which are relevant to those issues -- without unnecessarily narrowing the inquiry.

Finally, while Section 6(2) provides that a board of review "shall inquire", Section 6(3) provides that it "shall submit a report" to the Ministers "together with its recommendations and all evidence that was before the Board". In other words, the board reports and recommends. It is not a direct decision-making body as such, although the proposed regulation cannot become law until the board has reported. A board of review does not sit on appeal of a Ministerial decision to make an order or regulation. Rather, its report should be viewed as offering a 'sober second thought' (which is not to suggest that the initial proposal was deficient in sobriety). The board's fact-finding and recommendations provide a further contribution to the information and advice which is available to the Ministers who, in their recommendation to the Governor-in-Council, must ultimately make what is, essentially, a policy-political decision.

##### 5. Alterations to Proposed Regulations

The problem here arises in a situation where, following the inquiry and report of a board of review, the Ministers decide to alter an order or regulation or an amendment thereto so that it is different from the one which was originally proposed and published in the Canada

Gazette pursuant to Section 5(2). Is it, then, necessary to repeat this entire cycle of publication -- sixty-day period -- notice of objection -- board of review -- in relation to the modifications which the Ministers would now make to the proposals which were originally published?

Once more, the Board received a wide range of views on this issue. Some would adopt a strict interpretation of the Act. The Ontario Mining Association would insist upon publication of "all modifications to any regulation". A similar approach was taken by The Public Interest Advocacy Centre:

...if for any reason the Ministers choose to alter their recommendation after publication, the entire process must be started again...there would seem to be no way to avoid the second publication and waiting the 60 day period... (Appendix F-2).

The Canadian Manufacturers' Association would draw a distinction between "substantial" and "non-substantial" changes:

If before or during the hearing, the government changes the proposed regulation that has been objected to, and it is a substantial change, then the government should be required to reissue the regulation in the Gazette and give persons the opportunity to file objections with the Board under section 5(3). If the change the government initiates is not substantial, but only formal, then there would be no need to follow their procedure... (Appendix F-4).

Pollution Probe-Ottawa was unequivocal in stating its view that the Act could be read rather loosely:

If a Board of Review recommends a change (material or non-material) in a proposed regulation and the ministers decide to accept it, surely Parliament cannot be said to have intended in such case that there must be a revised publication of the proposal (with the possibility of a second Board of Review inquiry) before the ministers can ask the Governor in Council to act. Parliament cannot reasonably be said to have intended to create such an absurd circus, wholly wasteful of public funds. (Appendix F-1).

The Board also sought the informal views of legislative counsel in the Department of Justice.

Initially, it is important to draw a distinction between changes which are material and those which are not. If the changes in question would not "modify or supplement" the regulations "in a material respect" then there is no obligation to publish them nor to refer them to a board, one is already in existence. The changes may simply be made as with any ordinary regulation where no board of review is required. Section 5(2) is reasonably clear on this.

What if the change does involve a material modification? Does the language of the Act reflect an intention of Parliament not to require further publication? If that were the case, would it not be possible for a Minister to avoid the board of review process in relation to controversial issues merely by publishing a bland proposal and then recommending an extreme measure to the Governor-in-Council -- however unlikely this might be? While Parliament should not be interpreted to have intended a potentially endless merry-go-round of sixty-

day waiting periods and boards of review, neither should Parliament be interpreted to have intended that the board of review process be easily circumvented.

In the Board's opinion, the most reasonable interpretation placed upon the legislation in response to this problem was offered by counsel from the Justice Department. He suggested that the courts might well consider the central question to be whether the proposed changes arose out of the board of review hearings where full opportunity had existed for the making of representations and presentation of evidence in relation to them. Provided that had occurred, the failure to publish anew would not affect the validity of a changed regulation (in the case of a new regulation) or a changed amendment subsequently adopted by the Ministers. The key would be, therefore, whether or not a proper hearing had been made available in relation to the changes in question.

It is true that the general public would not have had notice of the changes to the amendment via the Canada Gazette. However, assuming that they bear a reasonable relation to the proposals which were published, that should not be cause to reject this result as a reasonable approach to be taken. Of course, the question of whether or not a proper hearing was available would depend very much upon the particular circumstances involved. If a regulation were to be challenged a court might hold in one case that the hearing requirements had been satisfied but, in another, that the regulation ultimately adopted

was so different from the course of the inquiry that nothing short of full notice and the subsequent possibility of another board of review would suffice.

The source of the changes would not matter. They might have been suggested by a person appearing before the board, including a government official. They might have been specifically recommended for the first time by the board in its report (or, indeed, considered and rejected). They may have been articulated for the first time by government officials as a result of their analysis of the report of a board which made no specific reference to them. The issue in each case would be whether or not the parties who had participated in any way in the proceedings of the board, had had an adequate opportunity to offer evidence and make representations in relation to the changes.

Of course, as a practical matter, the Ministers may wish to take the cautious route of publishing any change which might be considered to be material even though a delay of at least sixty days would result. In the event that a notice of objection should be filed, it would be a simple matter for the Ministers to reappoint the same board, which could commence by adopting the evidence which had been received by the previous board for the purpose of the new proceeding. The proposed changes could then be dealt with expeditiously.

The uncertainties created by the existing provisions are unacceptable. Legislative changes clearly are required and recommendations are made accordingly in Chapter IV.



### CHAPTER III

#### ADMINISTRATIVE AND PROCEDURAL CONSIDERATIONS

##### A. ADMINISTRATIVE MATTERS

###### 1. Relationship with Government

The feature of a board of review which is most crucial to its role is the board's freedom and independence from the governmental officials responsible for developing the proposals in question. The minute that a board of review is perceived as a part of normal departmental machinery, it will lose its credibility and, therefore, its raison d'être. A board must, therefore, maintain an arm's length relationship with government departments so that its independence will not only exist in fact but also be so seen by the public to exist.

There is an inherent difficulty for boards of review in maintaining this kind of relationship since at present they must rely upon Environment Canada principally for all of their support services. Section 6(3) of the Environmental Contaminants Act provides that "a Board has and may exercise all the powers of a person appointed as a commissioner under Part I of the Inquiries Act". However, those powers do not include the powers contained in Section 11 (Part III) which authorize certain commissioners to:

...engage the services of such accountants, engineers, technical advisers or other experts, clerks, reporters and assistants as they deem necessary or advisable... .

It is to be noted, by way of contrast, that boards of review established under the Hazardous Products Act are specifically given this authority by Section 9(4) of that Act.

As a result, the responsibility for providing boards of review under the Environmental Contaminants Act with the resources necessary to fulfill their mandate, falls upon Environment Canada, as the department with primary responsibility for the administration of the legislation under which these boards are created. Environment Canada has made available to the Board a draft of its "Guidelines on Spending", which are as follows:

Guidelines on spending: Ultimately, Environment Canada and Health and Welfare will underwrite an equal share of the external cost of the Board. Guidelines have been drawn up to assist the Board in controlling expenditures in the public interest.

- i. Secretarial Support and Business Accommodation: The Contaminants Control Branch will arrange for clerical and secretarial support and business accommodation as required.
- ii. Expertise: Should the board require the services of specialists, every effort will be made to accommodate this need through employee secondment arrangements.
- iii. Hearings: facilities, and translation: An important criterion in the selection of a location for a hearing will be the availability of Government conference facilities in the area. Every effort will be made to utilize such facilities. The use of the Secretary of State translators will be a preferred option.
- iv. Travel and Accommodation: Board members and their personnel will adhere to the Treasury Board Guidelines in this regard.
- v. Contracts: All contracts commissioned by or on behalf of the Board will be negotiated through DSS or in compliance with DSS "contracting-out" and tendering procedures.

- vi. Financial Records: The Chairman will ensure that financial records are kept, and available for scrutiny by the Auditor General's Office at any time.
- vii. Board Members' Fees: Board members will be paid a per diem fee, comparable to their current salary. The per diem rate paid to non-salaried members will be determined through consultation with DSS (salary scales). In the event that no billing is received, provision will be made for a nominal honorarium.

The PCB Board of Review was offered, and accepted, the services of a senior biologist from Environment Canada as executive secretary. It is the Board's understanding that the executive secretary was responsible for his regular duties during this association. The Board believes from this experience that such an executive secretary from within the Department is likely to be placed in a very difficult position in trying to respond to his normal duties while servicing the needs of any future board.

Most typing and related secretarial services were, in turn, provided by the Department and from among personnel already fully engaged. In addition, the general difficulty of obtaining shorthand-trained secretaries from within the Department added to the burdens of both the executive secretary and the Board itself. Some improvement took place in the work patterns of the Board in relation to this Second Report. For example, the Board experienced no difficulty from the Department in entering into a contractual arrangement to retain the services of a lawyer active in the Administrative Law field.

The Board raised with officials of Environment Canada the potential problems which might be created in the future by the reliance of boards of review upon support personnel seconded from Environment Canada (or Health and Welfare Canada). The difficulty was fully understood and appreciated:

The difficulty with that, and I do understand it, is that the Board exists for the purpose of assessing in large measure the adequacy of work of the department that is its financial master and it is that which is the dilemma and, therefore, if it feels that it wishes to do more work the department is theoretically in the position of saying, no, you cannot have any more money. (Mr. Robinson, transcript, April 14, 1980, p.158, Appendix L).

At the same time, the Board appreciates as a legitimate concern in the public interest that a board of review should not become carried away by a sense of its own importance and embark upon an inquiry far beyond the scope and duration of what might reasonably be necessary under the Act:

Now the other side of the coin, of course, and we have had that experience, is where we establish a Board or a hearing or a commission of some kind,...do so in a manner which is administratively divorced from the department, and where the department from a budgetary standpoint basically loses control of the situation and yet has a charge against its budget which could go on indefinitely and, indeed, in the case that I am thinking of, it went on a very long time and cost a great deal of money and left the department very badly burned by the experience... .(Ibid).

In the Board's view, within the existing legislative provisions, it is generally not desirable that public servants of Environment Canada or Health and Welfare Canada be seconded to boards of review to provide support services. Where secondment from government departments or agencies other than the above is not available or appropriate, the board itself should enter into contractual arrangements directly with the personnel required. Of course, boards will still have to rely upon Environment Canada to arrange for contracts in compliance with general governmental regulations. In particular, it would seem inappropriate for boards to accept seconded "specialists" from the department responsible for the development of the proposals in question. The assistance of such persons, if sought at all, should be utilized through the normal presentation of evidence during public hearings.

In view of the ambiguities surrounding the creation and operation of the first Board of Review<sup>1</sup> -- the Board recommends that future boards of review make a point, at the outset, of discussing administrative and funding procedures with senior departmental officials and come to a full understanding. These funding problems should include expenses associated with the conduct of public hearings including the travelling expenses of witnesses who are summoned and such other details as experience shows to be necessary.

The present Board's experience with the appointment of its members and the beginning of its operations was somewhat confusing due, no doubt, to the novelty of the system as the first Board of Review to be created under the Environmental Contaminants Act with two Ministers

<sup>1</sup> See First Board of Review Report pp.1-5.



involved in the appointment process. Experience now suggests that the Minister (or Ministers) or the Deputy Minister of Environment should deal directly with the chairman in the setting up of a board, in helping to define its mandate, and to assist the chairman in all other matters designed to assure an efficient and independent operation.

## 2. Executive Secretary

The executive secretary has an important role in the smooth and efficient execution of the business of a board of review. Ideally, the person filling this role will be one who understands government operations and the functions of various service departments. This person might be acquired from within the public service on loan from a department (preferably other than those referred to above) or might be on retirement from a reasonably senior administrative position. The important qualification is that such a person 'know his way' in relation to the federal government. This appointment should be a first priority since the executive secretary will assume responsibility for all other administrative matters.

The initial tasks of the executive secretary will include making arrangements for the first executive meeting of board members. A location will have to be provided for that meeting and subsequent ones. Board members should be briefed on government travel and accommodation provisions if travel is required. Arrangements should be made for recording the proceedings. Under the direction of the chairman, an agenda should be prepared and distributed.

The executive secretary should also establish a point of contact within Environment Canada and one within Health and Welfare Canada. Each should be a person who is fully familiar with the department's past and present activity in relation to the proposed order or regulation as well as with the departmental personnel who have been involved therein. As a liaison with the department in question, this point of contact or "facilitator" will provide continuity in the board's relations with the department, for example in making facilities available, identifying appropriate witnesses who might be called to provide background explanation and so on, while at the same time, providing a focus within the department for other officials to be kept informed of the board's progress. The appropriate "facilitator" should be specifically designated by the respective deputy ministers.

The executive secretary should, as early as possible, gather together for the board members, all earlier documentation which is available in relation to the proposed order or regulation. For example, a Socio- Economic Impact Analysis (SEIA) normally will be available.<sup>1</sup> As a result of the earlier consultative stages, there

<sup>1</sup> The SEIA is prepared by the Planning, Policy and Analysis Branch of Environment Canada and can be obtained through the Director. A SEIA was not submitted to the Board in relation to the First Report on PCBs. For a full description of Government policy in relation to the requirement for a SEIA, see the letter from Mr. Seaborn dated June 13, 1980, Appendix G. It is interesting to note that in contrast to the Department's calculation based on a life-time retirement program for equipment, the Board's recommendation in the First Report for a 5% per annum retirement policy would lead to the proposed regulation falling into the category of a "major" status as defined in Mr. Seaborn's letter and would, therefore, require a full SEIA. It should also be noted that in the case of PCBs the requirement for SEIA was not in effect when Chlorobiphenyl Regulations No. 1 was promulgated on February 26, 1977.

may also be published reports of advisory committees appointed under Section 3(4) of the Act or reports of informal task forces.<sup>1</sup> (These documents normally should be entered into the record of the Board at its subsequent public hearings).

As the work of the board proceeds, the executive secretary will have the responsibility of ensuring adequate facilities for all public hearings. These should be personally inspected and tested in advance. Translation services may be required in some situations.

Section 6(4) of the Act requires that the board ultimately submit to the Ministers not only its report and recommendations but also "all evidence that was before the board". Therefore, the executive secretary should maintain an official public record of the board's proceedings, consisting of all documents filed and exhibits entered as well as transcripts of the public hearings.

As to executive sessions, the Board agrees with the following recommendation of The Canadian Manufacturers' Association as it applies to public records:

Records should not be kept of the executive sessions of the Board as a transcript of the public proceedings will be sufficient to assess and comment on the information that was presented to the Board. Interested parties have a right to know the facts upon which the Board develops its recommendations to the Minister. They do not have the right to know the decision-making process the Board went through in reaching its decision. (Appendix F-4).

<sup>1</sup> No advisory committee was appointed with respect to the PCB problem but a task force was appointed and reported on April 1, 1976.

Of course, the board will want to have a confidential record kept of its executive sessions for its internal use.

The executive secretary will have, generally, to make whatever arrangements are necessary to 'get the job done'. At times, departmental facilities may be adequate, for example, in relation to the reproduction of materials or the distribution of notices. However, it is essential to confirm specifically that the needs of the board can, in fact, be met. In the experience of this Board, a number of persons received notice of a hearing the day after it had been held. If departmental facilities are not adequate to the task or unavailable because of other priorities, the executive secretary should obtain the necessary services as required through contractual arrangements.

### 3. Preliminary Executive Meetings and Publicizing of Operations

Upon the appointment of a board, the Ministers will, no doubt, issue a press release announcing the names and backgrounds of the board members, the nature of the board of review process, the content of the proposed order and regulation and the nature of the objections which had been filed.

A first priority for the preliminary executive meeting of a board should be to arrange for appropriate public notice of its operation and hearings. In view of the independent nature and functions of a board of review, the board should as soon as possible issue its own press release containing the following:

- a statement similar to the Ministers' initial release but this time coming from the board itself. (It may be appropriate simply to attach a copy of the Ministers' initial release).

- the name and address (normally that of the executive secretary) where inquiries may be made and an invitation for written submissions within a specified period of time;
- the date and location of the first hearings of the board, perhaps with an indication that the procedure to be followed will be the subject of preliminary discussion;
- a request that persons intending to appear and present evidence and/or make representations provide notice to the board of their intentions within a specified period of time.

In addition to issuing a press release along these lines, the board will want to publish a similar notice in Part I of the Canada Gazette and in an appropriate newspaper of general circulation. If the order or regulation has a special significance to a particular location, publication in a local newspaper and the holding of local hearings may be desirable.

In view of the importance of relations with the public and the press inherent in the work and procedures of most boards of review it may be desirable to have professional press relations personnel available to the board from the beginning of its operations. Such personnel may be seconded or contracted for as appropriate.

The board members should discuss and come to a tentative conclusion as to the procedures which will be followed at the public hearings. It is desirable to permit submissions and discussions in relation to such procedures prior to the substantive hearing. Part B of this chapter contains a discussion of procedures which might be considered.



#### 4. Translation, Printing, Submission, Publication and Distribution of Report

The only requirement imposed by the Act is that a board submit its report and recommendations (together with the evidence) to the Ministers. The Act then requires that the report be published within thirty days. While the board naturally would cooperate fully with the departments concerned the responsibility for translation, printing, publication, and distribution falls upon the Government and it must bear in mind the thirty-day rule. Since it will be necessary within this period to arrange for translation and printing, it is highly desirable that a board provide some advance warning as to when its report might be expected. In that way, the facilities, both translation and printing, might be cleared to deal with the report expeditiously when it arrives. The Board believes that fresh thought should be given to extending the present thirty-day rule for translation and publication to read "thirty working days" in view of the tightness of the timetable.

In submitting its report to the Ministers, a board of review should be conscious of Section 6(5) of the Act which specifically recognizes that a board may state:

...in writing that it believes the public interest would be better served by withholding publication... .

If that should occur, the Ministers must then decide:

...whether the report, either in whole or in part, should be made public.

This language does not make it clear that the board has the discretion to recommend the withholding of any part of a report. In view, however, of the discretion available to the Ministers to publish a report in whole or in part it would be a reasonable interpretation that the board be deemed to have a parallel option. It would seem appropriate, therefore, for a board to be able to recommend a withholding of publication in part only.

Bearing in mind the general nature and purpose of the board of review process it is difficult to conceive of many situations in which a board would recommend that publication be withheld. Nevertheless, there may be considerations of commercial confidentiality where one company might be seriously prejudiced by disclosing information about its operations to another or the public. Where such information would add little to public knowledge or understanding, the public interest might be better served by non-publication even though a commercial interest were being protected. The Board is very much aware that recommendations against publication should be made only under unusual circumstances.

Prior to the submission of the Board's First Report it had provided the Ministers with an Interim Report in the form of a letter reporting favourably on the proposed amendments. This procedure was followed in order to expedite the process of promulgation of the proposed amendments without the Government having to await the completed report of the Board. The Deputy Minister of Environment Canada has commented favourably upon such an approach. He indicated that it would enable the Government to carry out the many legal and adminis-

trative procedures required before the publication of a final order or regulation. This would allow the order to be brought into effect within a reasonably short time after the Ministers have received and made public the board's formal report. (Appendix M).

This approach may be expeditious and problem-free in some situations, but the Board wishes to caution future boards of review against adopting it as a precedent for every case. While the report of a board of review is a precondition to the making of a regulation it is not strictly speaking a decision-making body but only advisory. It can, therefore, be argued that its analysis and reasons are as important as its actual recommendations to the Ministers when they are considering their final decision as to the course of action which they should follow. They may, of course, totally ignore the recommendations of a board of review so that, ordinarily, the full report should be considered by them before making a decision. In cases where notices of objection have not been withdrawn and remain in effect, there may be potential for skepticism on the part of members of the public where they see only a "favourable recommendation" without supporting reasons. Finally, there is always the remote possibility that during the period between the interim recommendation and the final report, the board's view might be influenced by a public incident, a scientific discovery or its own further deliberations, resulting in a (collective) change of mind. In any event, there is provision in the Act for the Minister to act unilaterally in the face of an emergency so that there will not be a pressing need for an interim report. It worked well for the First Report of the PCB Board of Review. It may not always be appropriate in the future.

In the release of the Board's First Report to the public, it was mutually arranged by the Board and the Ministers that a press conference would be held. This was done. The conference was conducted by the Board of Review but officials from both Departments were present and were invited to participate, particularly in response to questions of a more technical nature. All indications suggest that this format was successful and it should be considered for future boards.

Finally, with respect to the distribution of the report, the Board has suggested in Chapter IV, Part A, that a mailing list be developed which could be used by future boards. As a matter of courtesy, copies should be sent to all who have made written submissions or participated in the public hearings.

## B. PROCEDURAL CONSIDERATIONS

The Environmental Contaminants Act provides that boards of review have the powers granted under Part I of the Inquiries Act, R.S.C. 1970, c.I-13. However, these are limited to general powers to enforce the attendance of witnesses and compel testimony. No procedures are specified. Nor is provision made for the establishment of procedures. In contrast, the Hazardous Products Act provides:

S.7. The Governor in Council may make regulations...(c) prescribing the procedures to be followed by a Hazardous Products Board of Review established pursuant to section 9 in conducting an inquiry;

The regulation-making power under the Environmental Contaminants Act contains no such authorization. This omission does not preclude the use of suggested guidelines for procedures as set out in this Part of the Report.

A useful comment on procedure was provided to us by the General Counsel of Eurocan Plup & Paper Co. Ltd.:

The procedures of the Board will have to vary somewhat with the nature of each enquiry. Surely in certain cases it will be appropriate to proceed on a strictly adversary basis when major chemical manufacturers who have a significant financial interest in protecting markets face a Government objective of eliminating the use of these chemicals. In more general enquiries an information gathering approach would appear to be more appropriate. Other than establishing general guidelines to prevent a Board of Review straying too far from the subject matter of the enquiry on the one hand and preserving the generally accepted standards of



natural justice on the other, I believe that a Board of Review should be able to establish the procedures that best suit its area of enquiry. This approach leads to the selection of members for Boards of Review who can best fulfill these objectives. (Appendix F-6).

The Board is in general agreement with this approach.

While following a basically similar pattern, the procedures adopted by a particular board should depend, in part, upon the nature of issues before it and the positions taken by those presenting evidence and making representations. One inquiry might be limited to the straightforward and restrained presentation of scientific evidence on a narrow technical issue. Another might be forced to deal with a wide-ranging canvas of policy or a confrontation between opposing interests where considerable emotion might be generated in a highly adversary atmosphere.

As suggested earlier, a board of review at an early stage will wish to define and crystallize the issues with which it must deal. It will then hope to dispose of those issues as expeditiously as possible, avoiding tangential considerations and undue repetition. However, it must also strive to let all of those appearing have their say. Impatience and undue haste on the part of a board may destroy its credibility and, therefore, undermine its primary function.

It should always be kept in mind that procedure is not an end in itself but a means to an end. Ideally, procedures should not create a technical, "legalistic" atmosphere, but avoid such an environment.

They are, generally, most effective when least obtrusive. They should, therefore, be characterized by sufficient flexibility to permit the discretion and good judgment of the chairman to prevail when demanded by common sense, yet be sufficiently stable to permit everyone who is involved to know what to expect. Hence, it is desirable to commence hearings with an outline of the procedures proposed to be followed and to permit representations with respect to any variations which might be proposed.

Since a board of review does not exercise a direct decision-making function, it may not be bound strictly by the common law "rules of natural justice" in relation to its procedures. These "rules" impose upon certain tribunals certain procedural standards of fairness such as the right to notice of proceedings, the right to respond to allegations, and so on. While a board of review may not be bound in law to conduct its proceedings in accordance with these principles, it is considered vital to the integrity of a board that its procedures be characterized by a general spirit of "fairness" and that this pattern be seen to be so, and, indeed, thus be close to the "natural justice" standard.

Should the procedures be formal or informal in character? Formality in procedure generally suggests sworn testimony; rules of evidence; the examination, cross-examination and re-examination of witnesses; representation by legal counsel; and so on. The Board is of the view that proceedings should, generally, be characterized by informality whenever possible. However, that informality should give

way to more formal procedures where necessary to the proper conduct of the inquiry. For example, if there is a limited number of witnesses in attendance, presenting evidence on technical matters, the proceedings might take the form of a 'round the table' discussion in which all of those present might participate. If by contrast there is a direct conflict between two parties with opposing interests, the formal presentation of evidence with right of cross-examination may be appropriate. Where that occurs, particularly where the credibility of witnesses comes into question, the evidence should be received as testimony under oath.

In the Board's examination of procedures followed in the United States in certain environmental hearings, the Board was impressed by the ease with which they were able to move from formality to informality and back again. The Board was informed, however, of two fundamental conditions for the legal acceptability of this kind of flexible approach. They are:

- a) the necessity for adequate public notice of every hearing, whether formal or informal; and,
- b) the necessity to maintain a full transcript of the proceedings, no matter how informal they might be on any particular occasion.<sup>1</sup>

<sup>1</sup> For a recent United States view on this matter, see the Notice of Proposed Policy on Public Participation, U.S. Environmental Protection Agency, Federal Register. April 30, 1980, Vol. 45, no 85, p.28912. (Appendix N).

The Board is of the view that this general approach and these preconditions are desirable, and so recommends for application by future boards of review.

In the Board's discussions as to how best it might assist future boards of review in relation to procedure, the decision was taken to outline a general "code" representing an approach which might be considered by them. Time constraints discouraged the Board from providing a detailed and comprehensive statement and, in any event, it was decided that this was not desirable. The guidelines listed below do cover most of the significant procedural issues in an interrelated way. In developing them, the Board was greatly assisted by the draft which was provided to it of "Environmental Assessment Board Procedures for Hearings Held under the Environmental Assessment Act" of Ontario.

The following, therefore, is submitted for consideration for adoption in whole or in part by future boards of review.

Guidelines  
For Board of Review Hearings  
Under the Environmental Contaminants Act

1. (a) All hearings conducted by the board of review will be open to the public.
- (b) However, where the chairman is of the opinion that matters are likely to be disclosed at the hearing which are of such a nature that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest,

outweighs the desirability of adhering to the principle that hearings be open to the public, the chairman may order that the hearing concerning such matters (only) be held in camera.<sup>1</sup>

- (b) However, where the chairman is of the opinion that matters are likely to be disclosed at the hearing which are of such a nature that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest, outweighs the desirability of adhering to the principle that hearings be open to the public, the chairman may order that the hearing concerning such matters (only) be held in camera.<sup>1</sup>
2. (a) Notice of the time and place of the first hearing will be published by the board in Part I of the Canada Gazette and in at least one newspaper of general circulation.
  - (b) Hearings to be held at locations outside of Ottawa will be preceded by notice in at least one local newspaper.
  - (c) Any person who makes a request in writing, providing a mailing address, to the executive secretary of the board, will be placed on a mailing list to receive all subsequent notices of hearings and other releases of the board.
  3. (a) Any person who has filed a "notice of objection" and any other interested or knowledgeable person will be given a reasonable opportunity of appearing before the board, presenting evidence and making representations to it.
  - (b) Any person wishing to appear before the board must provide the executive secretary, at least two weeks in advance of the hearing, with a short and informal statement in writing of the facts and/or representations which that person proposes to present. (The purpose of this provision is merely to permit the board properly to schedule its hearings. It does not preclude the chairman from exercising a discretion to permit a person in attendance at a hearing to participate).
  - (c) The chairman may limit the evidence and representations of any person where they are unduly repetitious. (Informal arrangements may also be made whereby one person may present evidence on behalf of others as well as himself or herself).
  4. (a) Any person may be represented at a hearing by counsel or an agent.

<sup>1</sup> It is assumed that the chairman will consider the views of other members of the board in all rulings and it is essential therefore that he have the confidence of his colleagues.



- (b) The board may require any counsel or agent for a person or representing a group or association to file with the board the names and addresses of the persons represented and the authorization so to represent them.
  - (c) The manner in which counsel or an agent may participate in the hearing will be in the discretion of the chairman.
5. (a) Evidence and representation may be submitted in writing, through the executive secretary, without the necessity of the person making the submission appearing at the public hearings. Any communications received by the board which deal with the substance of the inquiry will be entered formally into the record of the proceedings at the public hearing next scheduled. The board may establish a time deadline for the receipt of written submissions which it will consider.
- (b) A full transcript will be made of all public hearings and will be available for inspection by any interested person through mutual arrangement with the executive secretary. Copies of all or parts of the transcripts may also be obtained but a fee may be charged. Copies may also be deposited at suitable public depositories (e.g. libraries) for local and general access and use.
  - (c) The executive secretary will also maintain an up-to-date, running list of all written submissions received, witnesses heard and exhibits entered. A copy of this list may be obtained by mail, free of charge, by written request to the executive secretary. Such a list may also be deposited as in (b) above.
6. (a) The chairman may require any or all witnesses to present their evidence under oath or on affirmation.
- (b) Persons present at a hearing may request that questions be put to witnesses. Normally, such questions will be put through the chairman.
  - (c) The chairman in special circumstances may permit questions to be put directly to witnesses and may also permit cross-examination of the witnesses. In such circumstances, the chairman will indicate the range of questioning or cross-examination which will be permitted.
  - (d) Where the answers of a witness may tend to criminate the witness or may tend to establish his or her liability to civil proceedings at the instance of the Crown or any person, the witness will be informed by the chairman of his or her right to present such evidence under the protection of Section 5 of the Canada Evidence Act and any corresponding provincial legislation.

- (e) Before evidence or representations may be received involving allegations against the character, propriety of conduct or competence of any person, it must be established that such person has been furnished prior to the hearing with reasonable information with respect to such allegations.
  - (f) Witnesses summoned by the board may request payment for travel expenses.
7. (a) The board may receive any relevant and reliable evidence even though such evidence might not be admissible as evidence in a court.
    - (b) However, the board may not receive evidence which would be inadmissible in a court by reason of any privilege protected by the laws of evidence.
    - (c) The chairman will exercise a general discretion to rule out of order any evidence or representations which, in his opinion, are only marginally relevant to the inquiry, unduly repetitious, vexatious or contrary to the general purposes and decorum of the proceedings.
  8. (a) Subject to part (b), the board will base its deliberations, report and recommendations on evidence and representations which form part of the record as provided by section 5 (b) above.
    - (b) In its deliberations, report and recommendations, the board may take account of: (i) facts which are so notorious as not to be the subject of dispute among reasonable men; (ii) facts which are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy; (iii) generally recognized scientific or technical facts, information or opinions within the scientific or specialized knowledge of board members.
  9. A hearing may be adjourned from time to time by the board of its own motion or where it is shown to the satisfaction of the chairman that the adjournment is required to permit an adequate hearing to be held.
  10. The chairman may, in writing, authorize one or more members of the board to conduct a hearing on behalf of the board.

This Board would like to observe that the successful conduct of a public hearing will, in the end, depend upon the experience, sensitivity and plain common sense of the chairman and board members as well as the cooperation of those in attendance giving evidence and making representations.

## CHAPTER IV

### ADMINISTRATIVE AND LEGISLATIVE CHANGES

In this chapter, the Report makes a number of specific recommendations for improvements to the board of review process. Many of the problems addressed here were introduced in the two previous chapters. These have been grouped as recommendations under three separate headings. The first, dealing with "Administrative Changes", suggests initiatives which might be pursued by the Ministers without resorting to legislation. The second, involving "Legislative Amendment", suggests specific recommendations, which if accepted, would require amendments to the Environmental Contaminants Act itself. The third, under the heading "Other Matters", refers to issues which require consideration beyond the purview of the two Ministers referred to in the Act.

#### A. ADMINISTRATIVE CHANGES

##### 1. Composition of Boards

The Board understands unofficially that Environment Canada is considering ideas such as the following with respect to the composition of boards of review, and this has a bearing on matters discussed above. These suggestions include:

- a) a board shall consist of not less than three persons. The chairman of the board should possess expertise in the legal profession, and the board members should be experts in the scientific and technical, medical or environmental fields, as appropriate to understand the subject under review.
- b) in order to ensure that the board is seen to be impartial, the appropriate professional associations will be requested to identify and submit names of persons who will be considered by the Ministers as potential candidates for the board.
- c) the Chairman and Vice-Chairman of the Federal Interdepartmental Committee on Environmental Contaminants will be asked to review the lists of names submitted and to recommend, for the Minister's approval and appointment, candidates for the board.

It is to be noted that these ideas, appropriately, relate the expertise of board members to the subject matter under review. However, they fail to deal with the expertise and experience of the chairman necessary to the special role which he or she must play.

The role of the chairman requires not simply expertise in the legal profession but expertise and experience in the conduct of hearings. Many lawyers, in positions in government, law schools and private practice have never been involved in any way with hearings of this nature. While legal qualifications are desirable, the chairman should also be experienced in the conduct of hearings, whether they may have been previous public inquiries, arbitrations and grievances or special hearings under other statutes. Particular sensitivity and skills are



required which are not necessarily found in all members of the legal profession. It should also be borne in mind that such experience and expertise may also be found in persons with professional qualifications outside of the legal profession.

A key factor which must be considered in the selection of board members should be their impartiality. The credibility of a board of review will depend to a large extent upon how the public views the independence and fairness of board members. They must not be perceived as being tied closely to any particular commercial, governmental, political or other interest. The difficulty is that the most qualified and experienced people often will have gained that experience through an association, for example, with an industry which has an interest in the substance under review. Such a person should not be rejected out of hand, but the association with such interests and the potential damage to the credibility of the board in question would have to be weighed against the insights and expertise which that person might bring to bear upon the board's deliberations if appointed. This problem is considered further in the next section under "Conflict of Interest Guidelines". In many cases such difficulties can be avoided by the appointment of independent consultants, university professors, and others not identified with any special interests. Of course, in view of the fact that the board may not comprise all of the expertise required, these procedures do not preclude the board from calling upon persons with very special technical knowledge and skills to prepare background studies and testify despite the association such persons may have, or may have had, with any interested party. Naturally, such studies would be part of the public record.

It was interesting to note how, quite independently, a number of respondents to the questionnaire adopted positions very similar to those expressed above with respect to the composition of boards of review. Professor Wildsmith of Dalhousie Law School on behalf of the Institute of Resources and Environmental Studies of that University stated:

Because the board of review is a legal creature with statutory guidelines to follow, and should be complying with the rules of natural justice, I believe a lawyer should be chairman of the board. Board members from the scientific and medical-public scientific and medical-public health fields seem particularly important to the composition of the board. (Appendix F-7).

Mr. E. Czerkowski, a consultant in the field commented:

Most of the regulations under The...Act would involve legal, medical, scientific and/or engineering disciplines. The Act stipulated that the Board shall consist of not less than three persons. As a minimum requirement, the Board should be composed of:

- Lawyer with arbitration experience
- M.D. specializing in public health
- Professional engineer or scientist with appropriate experience. (Appendix F-8).

The Board agrees with these comments which also coincide with the approach taken by the Ministers in establishing the first board, namely the present PCB Board of Review.

The Public Interest Advocacy Centre offered similar comments in relation to the chairman and one of the board members. However, it suggested a different approach with respect to the third appointee:

Given the substantial community interest in such hearings, it would also seem desirable to have as a Board member an individual whose background might suggest a more general appreciation of social issues. In drawing lists which may be used to select Board members, it might be desirable for the Minister to invite suggestions from both public interest and industry groups. (Appendix F-2).

The Board is concerned about the possible implication that boards should have on it "representatives" of different interests. There is a danger that this could lead to the development of boards in the nature of an arbitration tribunal. The potential problem was well-articulated by Mr. Alexander (the former Legal Advisor to the Department of the Environment) in his testimony before the Parliamentary Committee prior to the passage of the Environmental Contaminants Act:

There is one thing that would worry me about the kind of proposal you have about industry and non-industry groups. You are likely to get a situation such as you have in labour relations where you get two people who would be representing different points of view and perhaps an independent chairman. But this is not what these boards are supposed to do. Everyone on these boards is supposed to exercise objective judgment and is not supposed to be representing any particular interest. So I think for that reason this business of industry and non-industry would result in a polarization where the real point is not going to be considered... .<sup>1</sup>

<sup>1</sup> Canada. Thirtieth Parliament. First Session. Standing Committee on Fisheries and Forestry. Respecting; Bill C-25, An Act to Protect Human Health and the Environment from Substances that Contaminate the Environment. Friday, June 27, 1975. Issue No. 42, P.28.

The Board is in complete agreement with these comments. Each board member must exercise objective judgment and not act as an "industry representative" or "public interest representative" or indeed represent anything but his own skill and impartial judgment.

The Ontario Mining Association raised the question of the size of boards and the potential problem of one of the members being unable to continue to serve:

A Board should consist of more than three members, and in the event that one of the members is incapacitated, three signatures would constitute a valid report. (Appendix F-9).

It is true that a larger board would permit the benefit of a wider range of expertise, however, that might be at considerable sacrifice. As boards expand beyond three, problems increase greatly in the coordination of the personal schedules of members in arranging meeting and hearing dates. That is particularly true where members reside in different cities. Also, as size increases, the formality of the board's executive meetings will increase but not the ease with which consensus is reached. Finally, there is the well-recognized difficulty that the sense of obligation of an individual member to attend and participate in meetings decreases as membership in the body increases.

In the Board's opinion, three is an ideal number for board membership. However, the Board does not recommend any change in the Act in this connection since a larger panel may be considered to be appropriate in exceptional circumstances. The Report deals with the problem of incapacitation of board members in section 7 of Part B of this chapter.

The Board has considered the idea of having a formally appointed panel of potential nominees from which members might be quickly designated as the need arises. Mr. Czerkowski suggested a more informal approach:

It would be desirable to prepare a list of potential Board Members so that each appointment could be made expeditiously when the need arises. The list should contain personal resumes of all candidates including their qualifications as well as professional and business affiliations. This would help to select the best qualified individuals and avoid conflicts of interest. (Appendix F-8).

In the Board's opinion, some comprehensive consideration of potential appointees is desirable in advance of the need for any particular board. However, there is no need to amend the legislation to achieve this end. The informal approach suggested in the passage quoted above would be adequate. Such a list, however, should not only be prepared but also should be maintained on an ongoing basis. The Ministers should welcome recommendations from a wide range of sources as to persons who should be considered for appointment to boards of review.



The matter of remuneration for board members is one which should be raised and settled definitively at the time of their appointments. Treasury Board guidelines establish a ceiling on the per diem fees for the "Services of Consultants, Commissioners and Other Individuals". That ceiling may not be exceeded without prior Treasury Board approval.

In most cases those provisions will be adequate. However, in the case of members of the legal profession, these guidelines may fall well below the 'going rate' for professional services. General recognition of this problem is to be found in the Government Contract Regulations P.C.1975-2042 as amended by P.C.1978-1818. Section 4 provides:

Notwithstanding anything in these Regulations, contracts for the performance of legal services may be entered into only by or under the authority of the Minister of Justice.<sup>1</sup>

The Board is aware that the payment of lawyers presents special problems simply because of the 'going rate' usually associated with senior members of that profession. Nevertheless, the remuneration of board members from other professions may present equal difficulties

<sup>1</sup> It is the Board's understanding that in its own case the Department of Justice was not the authorizing agent for the appointment and payment of the Chairman.

because of their seniority and expertise. This problem should not be confused with that of the chairmanship. While many chairmen will be lawyers some, certainly, will not be. It may be necessary therefore to consider a special stipend for the additional substantial duties of chairmanship.

The fundamental principle involved here is a fair and uniform treatment, so far as may be possible, for all members of the board subject to this special problem of the chairman and the stipend for his particular duties.

In addition, thought should be given to a possible procedure whereby a regular exception to the Treasury Board ceiling should be established as a matter of practice in relation to the appointment of lawyers to a board of review provided, of course, that the market value position of that individual established by his or her experience, qualifications and reputation warrants a 'going rate' beyond that Treasury Board ceiling.

## 2. Conflict of Interest Guidelines

The responses to our questionnaire were quite varied in relation to the issue of possible conflict of interest guidelines. Some thought them a good idea while others thought they would be unnecessary. Some suggested that conflicts of interest would be eliminated largely at the appointment stage.

It is the Board's opinion that conflict of interest guidelines should be established and brought to the attention of potential appointees at the time the appointment is offered. The

appointment would then be accepted with assurance by the appointee that no conflict exists at that time and on the understanding that any future conflict will be avoided during the term of the appointment.

However, it is desirable that the offer of appointment should also include a clear statement of the role of a board member with emphasis upon the requirement of independence and impartiality as opposed to representing any special interest. If it were to be considered necessary to offer an appointment to an employee of industry, the Ministers or their representatives would, of course, wish to discuss the matter with the employer of the prospective appointee. The employer should understand clearly that the board member's role may demand, in the public interest, a position on a particular issue which may be contrary to the interests of the member's home company. Most employers will understand this and be prepared to cooperate in the public interest. However, by raising the matter directly at the outset, the potential for future misunderstanding will be diminished.

### 3. Use of Advisory Committees

Section 3(4) of the Environmental Contaminants Act provides that:

The Minister and the Minister of National Health and Welfare may jointly appoint advisory committees to review any data collected ..., to receive representations from interested parties or concerned members of the public and to advise... the Ministers ...respecting measures to control the presence in the environment of any substance or class of substances.

Subsection (5) provides that such advisory committees must make public their reports and recommendations with the reasons therefor.

To date there has been only one advisory committee appointed pursuant to Section 3(4) of the Act. This is the Environmental Contaminants Advisory Committee on Mutagenesis which consists of an independent group of distinguished scientists from universities while representatives of government departments are present as observers or invited participants. The terms of reference of this committee are extremely broad:

1. To review data relating to the mutagenicity of chemicals pursuant to section 3(3)(a) of the Environmental Contaminants Act.
2. To advise on the evaluation of mutagenicity tests and the significance of such tests in terms of hazards to human health or the environment.

The Committee may receive representations from interested parties or concerned members of the public and reports and recommendations from the Committee will normally be made public.

While there is no public knowledge with respect to the views of the Advisory Committee on Mutagenesis about its own functioning, it has been in existence for almost two years and there are two reports now made public by the Committee. The Board is of the opinion that the advisory committee process lends itself either to broad or narrow uses, and later in this Report the Board points to a possible role for advisory committees in the future.

No advisory committee was established in relation to the PCB regulations. It was suggested to the Board that this was partly because there was not a great deal of controversy about the danger of the substance per se. Rather, it was a question more of the strategy of physically containing PCBs or eliminating them. (Mr. Robinson, transcript, March 13, 1980, p. 135, Appendix O). Nevertheless, it should be pointed out that Section 3(4) does contemplate that advisory committees will also consider "...measures to control the substance".

In the case of PCBs, a "task force" was established composed of representatives from the Ontario and the Federal Governments -- mostly government scientists from various departments. It was described as a "scientific advisory committee" with the purpose of surveying all of the scientific evidence and making recommendations as to what was required for a control strategy and program. Officials of Environment Canada and Health and Welfare Canada then considered these recommendations and decided that PCBs should be controlled. The specific form of the first regulation was formulated with the aid of industry in informal seminars organized and conducted by the Department. Finally the Department considered the socio-economic impact to some degree in formulating its position in relation to PCBs. (Dr. Brydon, transcript, March 13, 1980 pp.137-138 Appendix P and Mr. Seaborn's letter of June 13, 1980, Appendix G).<sup>1</sup>

<sup>1</sup> The Board was not made aware of any socio-economic impact study in the course of its work on the First Report.



The Public Interest Advocacy Centre saw an important potential role for the advisory committee contemplated by Section 3(4):

Advisory committees established under section 3(4) might well provide the most useful forum for public and industry involvement in the decision making process. To begin with, because the process is advisory rather than adversarial, there is considerable flexibility as to who the committee may hear and the manner in which the proceedings may be conducted...Providing the procedures adopted result in the presentation of a significant range of concerns and interests, the committee should be in an excellent position to define issues, identify areas of conflict and so to advise the ministers. (Appendix F-2).

In the Board's opinion, the Act contemplates a role for advisory committees beyond what has yet been realized in practice.

The function of an advisory committee is very different from that of a board of review. The former is concerned with the collection and assessment of data as well as, possibly, the shape of control measures, all leading to the formulation of regulations and hence should make its contribution before government officials have developed any commitments to particular control strategies or even the necessity for them in relation to a particular substance. The latter -- a board of review -- is concerned with the review of the control policy which the Government has specifically proposed as being appropriate. The former may include government officials who will be involved in advising the Minister. The latter must be independent and be seen to be independent.

Advisory committees should not be considered redundant merely because the department has pursued a number of other avenues of

consultation. They have several valuable features. Section 3(4) suggests that advisory committees could receive public representations. This is often a time-consuming and burdensome task which might tend to be evaded by some officials, but with an advisory committee having a specific mandate the situation will be different. Compulsory publication may encourage consideration of the wide range of interests likely to be affected by any recommendations. Further, publication imposes an added discipline likely to encourage comprehensive studies and realistic recommendations.

The opportunity for public representations at the advisory committee stage could have the consequence of reducing the number of "notices of objection" at the board of review stage. Moreover, if a board of review is established, the filing with it of the advisory committee's report could greatly reduce the length and scope of its hearings.

However, all of these advantages will depend on the willingness of Ministers to appoint advisory committees and permit them to realize their full potential in the contributions they can make to the regulatory process.

The Board recommends therefore that the Ministers consider the use of Section 3(4) of the Act on every occasion when a new regulation is being considered dealing with contaminants, toxicants, etc. and that, as a catalyst to action in this respect, departmental officials propose a draft of regulations governing their operations as contemplated by Section 18(j) of the Act. The Board also recommends that the Ministers not limit the contribution the advisory committees

are capable of making but that the Ministers in referring subjects to the advisory committees choose language that will encourage them to explore all reasonable aspects of the problems placed before them.

#### 4. Distribution of Reports

In distributing its First Report, the Board was surprised to learn that Environment Canada did not have available an organized 'long list' from which appropriate recipients could be selected. The Board recommends that such a comprehensive list be developed and maintained, not only for this purpose but also for the purpose of selecting persons and groups for consultations and notices from time to time. It should include all cognate government bodies at the provincial and municipal levels, environmental assessment boards, environmental and conservation advisory councils, and like bodies. It should also include appropriate public and specialized libraries such as chemistry libraries, medical libraries, and general university and technical college repositories.

Finally, the Board suggests that arrangements be made for the transcripts and documents of board of review proceedings to be available for examination by the public even after the final report has been submitted. It might be possible to provide copies of the transcripts and documents for deposit and public availability in the main libraries of the principal cities and towns particularly concerned with the subject matter of the review.

## B. LEGISLATIVE AMENDMENTS TO THE PRESENT ACT

### 1. General

In Chapter II consideration was given to the legislative framework within which boards of review must function. A number of problems were raised in relation to the statutory interpretation of the Environmental Contaminants Act.

In this Part the Board returns to each of the specific areas referred to in Chapter II. However, here specific recommendations are offered for legislative changes to deal with the problems discussed earlier. The sub-headings in this chapter follow those used in Chapter II except that four additional sub-headings have been added.

### 2. Any Person Having an Interest

It will be recalled that Section 5(3) provides that a notice of objection may be filed by "a person having an interest" in the proposed order or regulation. This may be contrasted with the limited status permitted under the Hazardous Products Act. Section 9 of that Act restricts the filing of notices of objection to "...any manufacturer or distributor of that product or substance or any person having that product or substance in his possession for sale...". It is evident that the language of Section 9 is even more restrictive than the provisions of the Environmental Contaminants Act and there is always the danger that a too-restrictive interpretation comparable to Section 9 might be placed on Section 5(3) of the Environmental

Contaminants Act. In order to avoid the possibility of such interpretation and in view of the broad interpretation given to the phrase in the Environmental Contaminants Act by the then Minister before the Parliamentary Committee, and by departmental officials before this Board, it is recommended that this phrase be amended to read "any interested or knowledgeable person". This would remove the argument that the filing of a notice of objection is restricted to persons who have pecuniary or proprietary interests. It would also make this phrase correspond with that in Section 6(2) describing who may appear before the board.

The Board is also of the view that provision might be made in the Act enabling the Ministers to establish a board of review even when no notice of objection has been filed. There may well be occasions when the Ministers might want very much to have the advice of a board of review in relation to a proposed regulation quite apart from any specific objection from a member of the public. For example, there might be a disagreement between the officials of two or more departments. In such a situation the Act should provide for a board of review to deal with a specific reference from the Ministers which would indicate the terms of reference of the inquiry, and the Board therefore recommends that the Act be amended accordingly.

### 3. Notice of Objection

Should criteria be specified in the Act as to what may constitute a valid notice of objection? The Board is of the opinion that it would not be productive to attempt to formulate criteria which



would have to be met for a notice of objection to be considered valid. Nevertheless, a basic threshold should be established to permit the rejection of objections which are frivolous or totally without substance.

If more elaborate criteria were to be specified, it would be difficult to conceive what they might be. Inevitably, unforeseen situations would present themselves. If access to boards of review is to be restricted, the better approach would be to restrict the range of persons permitted to file a notice of objection along the line considered in the previous section. Attempting to specify criteria would create greater problems of interpretation and would require more frequent adjudication. If a broad approach is to be taken to the persons who may file notices of objection (and those who may appear before the board), it would be contradictory and become the basis for future criticism to then restrict access by such persons through the imposition of detailed criteria for the validity of notices of objection.

Nevertheless, the Act should specifically require that the person filing the notice of objection state, generally, the reasons for the objection. These would be valuable in a number of respects. They would allow the board to narrow the scope of its review by crystallizing the issues, to a certain extent, at an early stage (still bearing in mind the general mandate imposed by Section 6(2) of the Act). It would permit government officials to prepare for the hearings by organizing the evidence available in relation to the stated reasons. It

would also permit a determination as to whether or not the objection meets the threshold requirement that a notice of objection not be frivolous or without substance.

Who should make the determination as to whether or not the notice of objection is frivolous? Section 11 of the Ontario Environmental Assessment Act provides that where the Minister of the Environment receives a notice requiring a hearing, he "shall", in turn, require the Ontario Environmental Assessment Board to hold a hearing

...unless in his absolute discretion he considers that the requirement is frivolous or vexatious or that a hearing is unnecessary or may cause undue delay.

However, a number of respondents to the questionnaire shared the concern that it might tend to undermine public confidence in the review process if this determination were to be left with the departments which had proposed the order or regulations. Of these, some took the position that the board of review itself would be the best place for such a determination. (See, for example, the replies from Eurocan Pulp & Paper Co. Ltd. (Appendix F-6), Ontario Hydro (Appendix F-5), and the Ontario Mining Association (Appendix F-9)).

There is no question that some additional expense might be involved in establishing a board of review whose sole purpose might be simply to decide whether or not there was a valid notice of objection or whether it was frivolous. Nevertheless, such expense could be kept to a minimum. One suggestion was that provision simply be made for the

person whose notice was being challenged as frivolous to appeal to the chairman of the last constituted board of review. (See the brief from Professor Wildsmith of Dalhousie Law School in Appendix F-7).

The Board is of the opinion that such a provision along these lines is desirable and recommends that the Environmental Contaminants Act be amended to permit the Minister to refer a questionable notice of objection to the chairman of the last duly constituted board of review. The legislation might be worded in terms of the last "available" chairman with provision as well for the Ministers to appoint a new chairman solely for this purpose if no others are available.

In Chapter II, the Board discussed the desirability of the informal procedure whereby departmental officials consult with the objector prior to the establishment of a board of review. If the objection is withdrawn, a board of review is not appointed. As the Board has already noted, such informal procedures should not give the appearance, or have the reality of, the 'making of a deal'.

In the Board's opinion, the Act should be amended to reflect this informal procedure. Section 6(1) should require the Ministers to establish a board of review not "Upon receipt of a notice of objection" but, for example, "Within thirty days of receipt of a notice of objection if, prior to the expiration of that period, such notice has not been withdrawn". This will provide an opportunity for the informal discussions with the objector.

Should the withdrawal of a notice of objection take place because the industry or company and the Government of Canada have

discussed and clarified the intent of the proposed regulation, the Act or regulation thereunder should provide that a report of such discussion between the government and those now withdrawing the notice of objection should be submitted to the Minister and made public.

#### 4. Role of a Board of Review

It was pointed out in Chapter II that the scope of the mandate of a board of review was to be found essentially in Section 6(2):

A board shall inquire into the nature and extent of the danger posed by the substance or class of substances to which any proposed order and regulations or proposed regulations referred to it under subsection (1) apply...

This is expanded by Section 3(3)(a)(v) which refers to "...methods of controlling the presence in the environment of the substance ...".

In the opinion of the Board, the present structure of the Act is deceptive. Section 6(2) suggests a limited inquiry into the "nature and extent of the danger posed" as do the first four sub-paragraphs of Section 3(3)(a). However, 'tucked away' in sub-paragraph (v) is the broad mandate to assess control policies which brings into play a general assessment of the proposed regulation and possible alternatives. The Board is of the view that Section 6(2) should be rewritten so that the entire mandate of the board, including the provisions of Section 3(3)(a)(v), is readily ascertainable from a reading of the main section dealing with it.

In Chapter II, the Board suggested that, under the existing Act, a board of review, once appointed, is required to carry out the mandate imposed by these statutory provisions rather than limit itself to any grounds which might be specified in the notices of objection. In other words, a general inquiry must be undertaken in relation to both the dangers of the substance and the effectiveness of the proposed order or regulation. In some cases, boards of review may be assisted by the notices of objection and representations which are made, in formulating the issues with which they must deal. Nevertheless, they must go beyond the issues raised by such notices and representations where that is necessary to fulfill their statutory mandate. The restructuring of the statute in the way that has been suggested should clarify that statutory obligation upon boards of review.

However, this does not address the more basic question as to what the scope of the board's review should be. Does the broad role which has been described really reflect what was intended by the introduction of the board of review process? In any event, is it desirable? Or should the Act be amended to limit the role of boards of review to inquire only into matters raised in the reasons (to be) given in the notice of objection and matters introduced through the evidence and representations of other "interested and knowledgeable persons"?

It may have been reasonable to assume that the main objectors to orders and regulations would be commercial interests which rely upon the substance in question in some way. It may have been assumed that since orders or regulations usually involve a restriction or prohibi-



tion, most ordinary citizens would view them as beneficial to their general interest in a healthy environment. However, that is not necessarily the case. Such citizens may feel that the order or regulation does not go far enough. Moreover, an amendment may be proposed to weaken an existing restriction. Therefore, broad questions of general hazards to health or environment and alternative methods of control will inevitably come into play. Even where the objection is made by a commercial interest, the board will, nevertheless, have to inquire into the broader questions if it is to do justice to the public interest in dealing with the commercial concerns.

The general consideration of public perception is also involved. A government may wish to refer commercial interests and ordinary citizens to the report of a board of review as an independent confirmation of the Ministers' assessment of the potential hazard and the soundness of the proposed solution. The public would not be able to rely upon the reports of boards of review in this way if they were limited to a partial inquiry restricted to the vagaries of the interventions which might be received. Indeed, boards of review reporting under such strictures would likely want to make a point of expressly stating that the report is not to be taken in any way as a comprehensive review of the hazards involved or the effectiveness of the proposed order or regulation in dealing with them.

The Board sees a considerable problem in any attempt to amend the existing Act in order to restrict the role of boards of review to an examination of the matters raised in the reasons given for the

notice of objection (or even, in addition, to the evidence and representations received). Any modifications of the review process along these lines should be considered in a much broader context. The Report does so in the next chapter.

## 5. Alterations to Proposed Regulations

In Chapter II, the Board indicated that considerable uncertainty surrounded the situation where, following an inquiry and report by a board of review, the Ministers decide to make an order or regulation which is materially different from the one which was originally proposed and published in the Canada Gazette pursuant to Section 5(2). The Board took the view in favor of a reasonable interpretation of the existing Act, with respect to material alterations, which might reduce the necessity for endless boards of review but provide fairness to those appearing before the board in relation to the proposal which was originally published.

However, there is some uncertainty whether the courts would, indeed, interpret the Act in this way. In the Board's opinion, the Act therefore should be amended specifically to deal with this problem.

The proposed Transportation of Dangerous Goods Act was referred to in Chapter I as another Act which would require the publication of a proposed regulation in the Canada Gazette in order that interested persons might make representations before it is promulgated. However, the proposed Bill also contained the following provision:

21(2) No proposed regulation need be published more than once under subsection (1) whether or not it is altered or amended after such publication as a result of representations made by interested persons as provided in that subsection.

In the Board's opinion, such a provision should be included in the Environmental Contaminants Act with an appropriate variation so that it would read as follows:

No proposed order or regulation need be published more than once under section 5(2) whether or not it is altered or amended after such publication as a result of representations made at or matters arising in the course of public hearings during the inquiry of a board of review.

Persons appearing before a board of review would thus have had an opportunity to be heard in relation to such representations.

Nevertheless, the problem would not be solved completely. Suppose that a person learns of the proposed regulation but decides not to appear since he supports the proposed approach. During the inquiry, a change is recommended with which he strongly disagrees. Had this material change been published he would have appeared before the board and opposed it. It might now become law without him having had the opportunity to do so.

In the Board's opinion, a partial solution, yet one which is acceptable in the balancing of adequate notice against repetitive boards of review, is simply for the new provision as proposed above to

be published in full in the Canada Gazette (and in other notices) together with the proposed order or regulation.

In other words, once the proposed order or regulation and the establishment of a board of review are both published in the Canada Gazette the public will know that any new alterations or amendments occurring as a result of representations made at, or matters arising in the course of, board of review public hearings will not require further publication if the subject matter of the alterations, etc. is related to the substance of the board's hearings.

Of course, should an alteration or amendment to the proposed regulation or order bear no relation to the evidence or discussions before that board of review, the Government would be obliged again to publish the new proposed alterations and undergo a second board of review procedure if so required by the filing of a notice of objection.

## 6. Regulations Respecting Procedures

It was pointed out in Chapter III that no provision is made in the Environmental Contaminants Act with respect to the procedures to be followed by boards of review. In contrast, the Hazardous Products Act contains a specific power to make regulations in relation to procedure:

S.7. The Governor in Council may make regulations... (c) prescribing the procedures to be followed by a Hazardous Products Board of Review established pursuant to section 9 in conducting an inquiry;

Rather curiously, the regulation-making power under the Environmental Contaminants Act does include such a provision in relation to "advisory committees". Section 18 provides:

The Governor in Council may make regulations...  
(j) respecting the procedure to be followed by any  
committee appointed under subsection 3(4);

If the Environmental Contaminants Act is to be 'opened up' for the purpose of amendments of the kind discussed in this Part, it is recommended that Section 18 also be amended by an addition to permit the making of regulations respecting the procedures to be followed by boards of review.

Such regulations are not required immediately. Indeed, caution is advised in establishing fixed procedures. Procedures prescribed by regulation should proceed slowly and incrementally, based upon the actual experience of earlier boards of review. They might start with basic requirements such as notice provisions in relation to hearings and gradually develop with time and experience.

#### 7. Provision Where Board Members Are Unable to Continue to Serve

In Part A of this Chapter, the Report raises the problem of a board member who, for reasons of health or otherwise, is unable to proceed. The Board recommends that a specific provision be included in the Act to deal with this situation. This amendment should provide that the inquiry may be completed and the report submitted by the



remaining board members. In addition, the remaining members should have the option of requesting that the Ministers appoint a replacement for the member who has become incapacitated.

In the unlikely event of two members of a three-person board becoming incapacitated or unavailable before the report is completed, the remaining member should normally seek the concurrence of the principal parties involved before proceeding to complete and sign the report. This proposal will assure the continuity of confidence that would be indispensable for the acceptance of a report under such conditions.

#### 8. Time for Publication of Report

In Chapter III, the Board expressed concern that the thirty-day period within which the Ministers ordinarily must make public the report of a board may be extremely difficult to meet, particularly where a lengthy report must be translated. The Board recommends that Section 6(5) of the Act be amended to change "thirty days" to "thirty working days".

#### 9. Withholding of Publication of Report

In Chapter III, A.4., the Board also referred to the possible ambiguity in Section 6(5) of the Act as to whether or not a board is authorized to recommend to the Ministers the withholding of publication of a report in part only. The Board also recommends that section 6(5) be amended to provide specifically that a board may state in writing its belief that the public interest would be better served by withholding publication of the report in part only.

## C. OTHER MATTERS

### 1. Administrative Independence of Boards

Many of the respondents to our questionnaire were not troubled by the dependence of boards of review upon Environment Canada, for administrative assistance and direct funding. Nevertheless, the Department itself, has recognized the problem. (Supra, Chapter III, at p.39). Moreover, the administrative relationship between Environment Canada and another body responsible for the conduct of public hearings has already been subject to public criticism. Mr. C.D. Robertson, Director of Evaluation and Coordination for the Federal Environmental Assessment Review Office was good enough to let the Board have his comment on this problem:

...it has been a source of criticism from just about everybody who has written on the process in the last three or four years. They have all underlined this point and the independence of FEARO and not only the actual independence but the apparent independence is vitally important... . (Transcript, April 14, 1980, p.219, Appendix Q).

As of April, 1980, some twelve separate public hearings have been conducted under the auspices of that Office with an additional twelve under way. Subsequent hearings by boards of review under the Environmental Contaminants Act could well lead to similar criticisms, namely, of too dependent a relationship on the part of a supposedly independent review agency.

One approach to this problem might be to amend the Act along the lines of the Hazardous Products Act. The latter grants to its boards of review the direct authority contained in Section 11 of the Inquiries Act

...engage the services of such accountants, engineers, technical advisers, or other experts, clerks, reporters and assistants as they deem necessary or advisable, and also the services of counsel to aid and assist... the board ...in the inquiry.

This would certainly remove any necessity for a board of review to be dependent upon Environment Canada for such services.

However, the Board understands the concern of the Department that such an authorization may be too 'open-ended' because of the absence of fiscal control and accountability. It may also be wasteful of resources because of the 'start-up' and 'wind-down' costs associated with each board of review which is established.

In the Board's opinion, the ideal solution is to be found in the development of common support services and funding procedures separate from the Department through the grouping together of a variety of permanent and ad hoc bodies which conduct public hearings that are similar in form. The Federal Environmental Assessment Review Office, for example, might offer an appropriate base provided it were first established as an independent agency. Its administrative structure and resources might then reflect a responsibility for servicing boards of review under the Environmental Contaminants Act, the Hazardous Products

Act and under other statutes which provide for ad hoc inquiries where the actual and perceived independence of the tribunal conducting the inquiry is essential to its role. A common 'pool' of executive secretaries, general secretarial assistance, transcription services, financial services, information services, and so on, might be developed with considerable saving to the taxpayer. For example, an executive secretary might be able to service two or more smaller inquiries at the same time. This proposal was put to Mr. R.M. Robinson by the Board and his favourable reaction was as follows:

Now, perhaps if there were, in fact, a structure in government that took on the responsibility of whatever board from an administrative standpoint, ... perhaps if there were a structure which had the business of running boards from an administrative perspective, which was manifestly non-political or non-policy and quite divorced from the departments that were involved in the issue at the moment, then perhaps some kind of middle ground of that sort is exactly what we are looking for... . (Transcript, April 14, 1980, p. 159, Appendix L).

The above proposal and Mr. Robinson's reaction to it suggests that this administrative approach could solve many common problems with minimum costs.

## 2. Uniformity in Public Consultation

It was pointed out in the first chapter, that a wide range of consultative processes are to be found in federal statutes and practices in relation to regulation-making. While in themselves uniformity and standardization are not necessarily great virtues, the Board cannot

help but feel that there may be some advantage in assessing the relative merits of various approaches and developing a general policy for the drafting of future statutes. If only to make our laws simpler and more readily understood by the lay person, a valuable purpose may be served.

The present legislative landscape reflects to some extent the role of Department of Justice lawyers in the development of legislation. The general approach is to accommodate the needs of the department responsible for the legislation, provided that is not contrary to law or good drafting practices. While an earlier statute may be drawn upon as a precedent, there is no overall policy as to the desirability of one consultative scheme as opposed to another. The Board suggests that it may now be appropriate for the Department of Justice, perhaps in conjunction with the Privy Council Office, to conduct a comprehensive review of public consultation processes in relation to regulation-making powers.

In the end, it may well prove to be that a diverse range of processes is, in fact, desirable. Certainly no attempt should be made to disrupt existing patterns and practices where they are working effectively. Nevertheless, the Board believes that the time is ripe for an assessment.<sup>1</sup>

<sup>1</sup> For an overview of the present general consultative processes viewed from the vantage of Environment Canada, both federally and in federal-provincial dealings, see the reply from Mr. J.B. Seaborn dated June 12, 1980 to the Board's letter of April 15, 1980. (Appendix R).



### 3. Funding of "Public Interest" Representation

Future boards of review are bound to encounter requests for funds to finance the development and presentation of evidence and representations before such boards. Indeed, one such request for assistance in responding to our questionnaire was received. The Board's position was, simply, that such funds are not available. As matters now stand, other boards of review under this Act will have to take a similar position.

The need for public funding of this nature was expressed in its brief by The Public Interest Advocacy Centre:

The principal impediment to effective public interest representation at hearings is a lack of financial resources. If the right of public interest groups to appear at these hearings is to be more than a merely theoretical right, some form of funding must be considered. (Appendix F-2).

The issue, therefore, boils down to whether or not government desires this kind of representation at these hearings. If provision for such representation is to be meaningful, resources must be provided.

The opposing view was also expressed by some respondents. British Columbia Hydro and Power Authority took the view that:

"Public Interest" groups need not be subsidized. If this is the case, then Industry should similarly be subsidized, otherwise a penalty is levied against one section in an inequitable manner. (Appendix F-3).

The Canadian Manufacturers' Association agreed, but for different reasons:

No funds should be made available for "public interest" representations at the hearings. This...would be contrary to much needed fiscal restraint by governments. (Appendix F-4)

The Board is of the view that a clear distinction can be made between industry and public interest groups in allocating public resources for representational purposes. Nevertheless, the comment on fiscal restraint points to the central difficulty in making such funds available.

Such funding has, of course, been provided at the federal level in the past. The mandate of the Berger Royal Commission authorized it to allocate grants for these purposes. The Canadian Radio-television and Telecommunications Commission may award costs to intervenors and has done so in the past, in substantial amounts. In the United States, Congress specifically provided in the Toxic Substances Control Act to permit the Environmental Protection Agency to supply funding for representation at proceedings under that Act. The Director of Operations of FEARO informed us that all twelve of the panels which have reported under that review process have recommended some form of public interest funding.

In its "Report No.13, Advisory and Investigatory Commissions" (1979) the Law Reform Commission of Canada recommended that all bodies conducting inquiries under the Inquiries Act be given carte blanche to allocate funding for these purposes. The Law Reform Commission would provide in future legislation that:

A commission may, in order to promote the full expression of information and opinion, pay any of the expenses or losses incurred by a person for the purpose of making representations. (p. 16)

In the Board's view, such a broad authorization is probably impractical. Nor is the concept of an award of costs appropriate for board of review hearings where, for example, there is no clear adversary situation involving an industry in a monopoly economic situation seeking a regulated rate increase. In the Board's view there is a clear need for an interdepartmental examination of this problem. The Economic Council of Canada has articulated well both the need and the associated problems, in its Interim Report, "Responsible Regulation". The following is an excerpt from that report which deals with this issue.

### (3) Assistance to "Public Interest Groups"

As noted at several points earlier in this report, there is some risk in altering the regulatory processes of governments to place a premium on participation by interested parties. The problems arise from the simple fact that some interests are better able to organize themselves and make their views known to the relevant decision makers. In particular, smaller, more tightly knit groups of individuals with large stakes in the outcome of a decision will have an advantage over large groups of individuals with small stakes in a specific issue. Consumer and anti-poverty groups are commonly cited examples of the latter category.

If reforms designed to improve the openness, equity, legitimacy, and accountability of regulation are to succeed, governments must also take steps to ensure that those interested groups and individuals can participate on a reasonably equal

footing. The Council fears that implementation of the institutional reforms without the necessary adjustments to ensure balanced public participation might well prove to be counter-productive.

Consequently, it is recommended that, as an integral part of any regulatory reform package, governments institute programs to provide public funds to "public interest groups" for participation in the processes by which decisions are made concerning regulation. The Council recognizes that such funding programs bring with them difficult problems: Who shall be funded? How much should they get? Should funding be granted on a general basis or only for specific issues? Should it be linked to the "quality" or "contribution" of the intervention? What degree of control should be exercised over the use of the funds? In what sense is the government to be held politically responsible for the use made of the funds by recipients? These are matters that must be addressed by each government in light of prevailing social, economic, and political circumstances. The "right answers" are certain to vary for each jurisdiction, and for the different decisions concerning regulation.

The Council will devote more attention to these matters in its Final Report. However, we wish at this point to reiterate one fundamental principle: funding for "public interest groups" must be considered as an essential component of regulatory reform. In assessing the extent to which the institutional changes recommended by the Council can be implemented, governments should consider the expected benefits, the expected costs, and their budgetary constraints. The Council suggests that outlays for a "public interest group" funding program be included in the total cost estimate. We wish to emphasize that the failure of "public interest groups" to participate in decisions concerning new regulations or the review of the evaluations of existing regulatory programs for want of public funding would undoubtedly diminish the value of the other reforms we propose. (p. 82)

The above reflects in clear and comprehensive language the views of this Board.

## CHAPTER V

### THE BOARD OF REVIEW PROCESS: ITS PLACE AND ITS FUTURE

The board of review procedure really comes at the 'tail end' of a long process in the development of a regulation. Months and years may pass before the recognition of a problem advances through a variety of stages and culminates in a specific proposal. The path will not always be the same and progress may be stalled as other solutions are attempted or other problems receive priority. In Chapter IV, the Board referred briefly to the role of the advisory committee under the Act. A variety of informal mechanisms will also be at play: interdepartmental committees, consultation between federal and provincial officials, informal interviews with representatives of industry, informal seminars with invited participants to study and discuss specific problems, representations by concerned members of the elected public to officials -- the potential range is as broad as human ingenuity.

In its Interim Report, "Responsible Regulation" (1979), the Economic Council of Canada expressed the need for public consultation by government as a part of the regulation-making process and indicated the benefits to be gained through public consultation:

Consultation is the process of exchanging information and advice between government departments and agencies and the private sector groups and individ-



uals. While it is not part of the process of making a final decision about regulatory intervention, it serves important functions, particularly at the problem identification and problem definition stages.<sup>10</sup> Both government and private sector should benefit from consultation. Governments are better able to assess whether intervention is necessary, gain a better understanding of the implications of their proposals, and may be able to identify alternatives to the proposed form of intervention. Private sector groups will have an opportunity early in the process to influence the regulations with which they must live and may provide valuable information that a regulatory authority will use in deciding an appropriate form or standard of regulation. The net result should be more rational development of proposals for regulatory intervention and a better understanding of the problems and attitudes on both sides. In the long run, success in achieving regulatory objectives may be facilitated and time spent in consultation may ensure easier and more immediate compliance. (p.74).

The Council also observed that there were a number of problems involved in consulting with the private sector:

First, there is the question of timing. On one hand, if consultation is undertaken "too early", governments may be accused of not providing enough information to which the private sector can respond. Governments, like other decision makers, consider many courses of action in varying detail and intent. Consultation at a very early "idea-floating" stage may raise false hopes or fears. Frequent consultation on inadequate proposals may overload private sector groups, particularly "public interest groups". On the other hand, if consultation is "too late", governments may be seen as being committed to a given fully developed proposal. Indeed, the greater the investment that has been made in refining a proposal, the less likely it is to be changed. The full benefits of consultation would then be lost.

Note: The reference to footnote 10 in the above quotation is not included since it is not directly pertinent to the remainder of the present chapter.

The second problem is answering the question of how much consultation is appropriate. While enough input to give a full range of information is desired, the private sector may complain of excessive government demands for information. Furthermore, there is a danger of confusing inadequate consultation with failure of governments to agree with the positions of those consulted. Sharing of information does not necessarily imply a sharing of decision-making authority.

The question of whom to consult raises the third problem. While there will undoubtedly be a set of obvious candidates in most instances, governments should avoid the convenient habit of consulting only with "established" groups. When new regulations may affect a large number of diverse groups, it may be hard to determine which to consult. (pp. 74-75).

The Board has quoted these comments at length since they provide a valuable introduction to the broad question of public consultation prior to the making of regulations. It should be noted that while the Council's report is an "interim" one, its comments in this area are probably final although it does not foreclose the possibility of reviewing its position in its Final Report. (Introduction, p.xv).

Coincidentally, a letter on the question of consultative mechanisms in relation to environmental regulations was published in the Toronto Globe & Mail of May 24, 1980, while the Board was in the process of drafting this Second Report. The letter, (Appendix S), from Mr. Joe Castrilli of the Canadian Environmental Law Association commented upon the review of regulations by the Ontario Legislature's Standing Committee on Regulations:

The key problems with the committee's review procedure include the fact that it takes place after the regulation is already law and that it cannot delve into the merits or policy substance of the regulation. In an environmental context this is especially disturbing because regulations are frequently the teeth...of government control efforts.

He went on to observe that:

There is no mechanism whatsoever in Ontario environmental legislation requiring public scrutiny of the merits or likely effectiveness of proposed regulations before they become law.

and:

Moreover, this problem is not limited to Ontario. There are at least 150 regulations under some 70 environment-related provincial statutes from British Columbia to Newfoundland. Yet not more than one or two of these statutes call for some type of public comment or review of draft regulations...What is needed is a mechanism or forum where the merits and policy substance of environmental regulations can be tested and necessary changes made before they become law.

Of course, the board of review process under the Environmental Contaminants Act provides just such a mechanism at the Federal level.

The difficulty which is perceived with the present board of review process under this Act, as a completely satisfactory mechanism for consultation through public hearings, relates to the first problem raised by the Economic Council in the passage quoted earlier: that is,

the question of timing. By appearing at a very late stage in regulation-making, it may deprive government of the full potential benefit of public consultation and may generate frustration in seeking to influence decisions to which a firm commitment had already been made.

The advisory committee system can assist but it is not an ideal vehicle for early public consultation. As discussed previously, it is not required by law to be established. Even when established, the committee may be restricted in its deliberations and consultations by the scope of the mandate given to it by the Ministers (supra, p.72). Moreover, the advisory committee may be too early a stage since there will not yet be in existence a public document which might form the basis for submissions and debate. In any event, if public hearings are to be conducted, the members of the body which is to conduct them should be appointed specifically for that purpose.

What then is the alternative to the existing process where boards of review may come too late, and advisory committees too early, and too narrowly focused in their membership and mandate, to be fully satisfactory as mechanisms for public consultation?

The Board is aware of views that the government should not take initiatives to seek out public consultation; rather, that a passive but 'open-door' approach should be adopted. In other words, this view argues government officials should consult with persons who come to them for that purpose. Government should also prepare and publish its proposals at a number of significant stages in policy

development. However, beyond that, it is argued there is no need to go. Governments need not be concerned that certain segments of the public do not contribute to the consultative process whether it be because they are inarticulate, unorganized, uninformed or without adequate resources. Provided the door is open, government has fulfilled its obligation.

While this view may have a certain initial appeal, the Board concluded that such an approach does not give adequate weight to the public hearing process as a valuable consultative mechanism. The Board fears that the 'open-door' policy may be too readily adopted because it is also the path of least expense and that it may too easily become the path of least resistance, with the door gradually becoming more and more closed. There is also the danger of general public misperception of the influence of particular interests where there has been no common forum for the expression of views -- especially when those views are clearly in opposition to each other.

The Economic Council of Canada also took the position that it would not be useful to attempt to formalize elements of the consultative process. After referring to the three problems contained in the passage quoted above, the Interim Report states:

In view of these problems, we conclude that it would be difficult, if not impossible, to institutionalize, particularly in the form of legislation, any meaningful requirement for a consultative process.<sup>11</sup> The Council, however, urges

Note: The reference to footnote 11 in the above quotation from the Economic Council's Report is not included since it is not directly pertinent to the remainder of the present chapter.



government departments and agencies to continue and, when appropriate, expand their informal procedures for consultation with individuals and groups that might be affected by regulatory intervention. (p.75).

The Board was rather surprised at the total absence in that Report of any consideration of the procedures surveyed in Chapter I and, in particular, the absence of any recognition of the present board of review process. In this Board's view, with respect, the Interim Report did not take adequately into account the potential merits of the public hearing process both as a consultative and a hearing mechanism which may be established as a legislative requirement -- and which now exists at the Federal level in a number of instances.

A formal public hearing is the most credible of instruments in the eye of the public. As Mr. Robinson has put it, "...it has a certain chemistry that can be very valuable". (Transcript, March 13, 1980, p.138, Appendix P). The former Chairman of the Ontario Environmental Assessment Board, Mr. David Caverley, spoke to the Board with great sensitivity of the significance which the public hearing process may have for some people:

I have always felt very keenly that we wanted to hear everything that had to be said about a project and I would not close off the hearing until I had heard it all and this led to certain repetition, yes. But, on the other hand, if you were sitting on the other side of the fence, and if you were these people and, say a multi-million dollar corporation was moving in there to completely destroy your fabric or your way of life in your small community, you would feel very, very keen about it. (Transcript, April 14, 1980, p.47, Appendix T).

The daily newspapers, recently, have been a regular reminder that many citizens may experience similar emotions with respect to government policies in relation to environmental contaminants. Open hearings also provide a focus for responsible and informed media interest which can contribute significantly to the public educative benefits of that process. They may also provide, on occasion, for an emotional release which contributes toward making complex and difficult decisions easier to accept by all of those affected.

A requirement of public consultation through open hearings may have a number of negative features from a government perspective. They are often expensive. They may delay the implementation of control mechanisms. They may lead to challenges requiring officials to come forward and support publicly, and possibly in the face of opposition, the advice which these officials may have given to the Ministers privately.

However, there are also advantages, even from the government's perspective. As suggested in Chapter I, such a process can serve to inform the public, through an independent and credible source, of the limitations in available responses by government or others to the problem being addressed. In this way, exaggerated fears or expectations may be reduced and the general level of humility engendered thereby is salutary for both government and the public. Indeed, public officials may often receive from such an exercise valuable guidance in carrying out their functions and in due course this may be a benefit

perceived by them as well. However, once again, this points to the need for the broad thrust of public consultation to occur before the advice of officials to the Ministers has crystallized.

The Board's general conclusion in relation to what is perhaps the broad question posed in this Chapter can be stated simply. It is the Board's opinion that it would be preferable to provide for a public hearing process at a much earlier stage in the making of regulations than presently may occur through boards of review. If such an approach is adopted, the scope and function of a board of review at the 'tail end' of the sequence might be substantially reduced.

The Board recognizes that this general approach might be accomplished in a variety of ways. However, in order to provide a coherent and concrete context for this general conclusion, the following model is advanced for consideration. It commences with the appointment of an advisory committee, following the conclusion of the internal "problem identification" stage. During that earlier period, a variety of informal consultative approaches will have been pursued by government officials, resulting in the conclusion that a problem exists which may well require government intervention.

The sequence might be as follows:

1. To appoint an advisory committee with terms of reference in accordance with the broad wording of section.3(4) of the Act and not restricted by an imposed narrower mandate (see Chapter IV, page 72). The process should include informal consultation and a general notice that public views will be received in writing. A formal

report would be published and distributed to persons who might be interested or affected. The composition of the advisory committee would remain as at present -- largely from the scientific community but including government officials where necessary. Subcommittees and task forces could be set up for specific aspects as required.

2. To institute the process required for a socio-economic impact analysis (SEIA) the advisory committee recommends a regulatory system and measures to implement these, since obviously a SEIA is necessary before further steps are taken.
3. To appoint a preliminary public hearings board with a broad mandate to deal with the information in, and recommendations of, the advisory committee and the SEIA report arising out of that committee's work. This new preliminary public hearings board would serve as a focus for public input as well as representations from all interest groups concerned in relation to the proposals and data in the advisory committee report. These public hearings should be required by statute to be held where:
  - a) recommended by the advisory committee
  - b) required by the Ministers
  - c) in the absence of action under (a) or (b) the proposed National Advisory Council on Environmental Quality so recommends. (See First Report, pp.20-22). Therefore all reports of advisory committees recommending against public hearings or silent on the issue would be forwarded together with the SEIA report to the National Advisory Council for

study and recommendations by that body as to whether or not public hearings should be held. The National Advisory Council's recommendations on this question of public hearings are binding on the Ministers.

This preliminary public hearings board should be specifically constituted for conducting public hearings to achieve the above purposes and therefore all of the Board's comments in Chapter IV, A.1, in relation to the composition and operation of boards are applicable here. Public hearings would be held with the broad mandate currently given to boards of review but would be held prior to the crystallization of a proposed regulation. The board would report to the Minister as provided for boards of review under the Environmental Contaminants Act.

The above sequence in the possible creation of the preliminary public hearings board is predicated on the assumption that the Ministers will appoint advisory committees in every case where, after initial departmental studies, a possible regulation is contemplated for the control of any given substance. The Board therefore recommends that the language of the Environmental Contaminants Act dealing with advisory committees be amended and strengthened to assure their regular use as contemplated in the above scheme.

4. To publish, where the Ministers have received the report of the preliminary public hearings board and have decided to proceed with a proposed regulation, that proposed regulation in the Canada Gazette



with a required sixty-day waiting period within which notices of objection may be filed.

Where a notice or notices of objection have been filed the subsequent procedures would depend upon whether or not a previous public hearing has been held by a preliminary public hearings board:

- a) if no earlier public hearings have been held then the board of review process will be available as under the existing Act.
- b) if preliminary public hearings have been held as described above in paragraph 3 then the board of review process becomes much narrower and leads to the following scope of operations:
  - (i) the standing of a person filing a notice of objection generally should be restricted to those having a pecuniary or proprietary interest or such other specific forms of interest that cannot be overlooked, e.g. groups with special regional or locational concerns or persons directly affected;
  - (ii) the notice of objection should be required to state the grounds of the objection and the scope of the hearing generally will be restricted to those grounds.
  - (iii) only those filing notices of objection and departmental officials would be granted standing before the

board of review and normally each notice of objection would be heard separately and would amount to almost a "trial" of the particular issue raised in a specific notice of objection.

(iv) notices of objection, including the grounds of the objection, having been published in the Canada Gazette and elsewhere, the public should be invited to attend and participate wherever there is concern with, or lack of clarity about, any particular objection as filed. The procedures set out in Chapter IV, B.5, with respect to changes to a proposed regulation will apply as described.

(v) while the witnesses specified in paragraphs (i), (ii) (iii) and (iv) above may be heard as of right, no other witnesses would be permitted to be heard or make representations, but the board nevertheless may admit evidence or submissions whenever in its discretion it deems such information and views to be important and relevant to the board's examination of the specific regulation under study.

The above description of a narrower focus for the operation of a board of review stems from the expectations that the broad general inquiry into the rationale of the need for a regulatory system, etc., as conducted by the preliminary public hearings board, would be sufficient to satisfy the wide popular interest and concern in the control of the particular toxicants or contaminants.

Hence, the board of review can serve the environmental protection process best by concentrating sharply on the issues before it as defined by the notices of objection.

In either (a) or (b) a board of review reports to the Ministers as under the existing Act.

The sequence envisaged in this model commences with the Minister's decision to appoint an advisory committee in relation to a particular substance. It is this decision which opens the door to public participation in relation to the development of a potential order or regulation. Should the Minister decide not to appoint an advisory committee, the Board recognizes that a strong case can be made for providing a mechanism which would also permit the public to influence and possibly reverse that decision since such a decision would foreclose a forum for public representations in relation to a particular substance.

Of course, a Minister of the Crown will always be subject to political pressures resulting from perceived or actual inaction in relation to his or her departmental responsibilities. The question remains whether a mechanism should be available for the public to initiate the operation of the proposed model. Such a mechanism would be an alternative to reliance upon a Ministerial discretion.

The Board is of the view that there is considerable merit to such an approach. In conjunction with the scheme described above, consideration should be given to authorizing, by statute, the proposed National Advisory Council, to require the appointment of an advisory

committee in relation to a particular substance, thereby generating the sequential process described in the model -- since the Council's recommendation to the Minister would be binding upon him.

In many respects the board of review process even under the present Environmental Contaminants Act represents the achievement of a certain level of governmental and political sophistication. The board process means that government has imposed upon itself an absolute precondition to the exercise of its power to make certain regulations.

However, the novelty of the process suggests that it should not be considered as a final stage of development. The novelty further suggests that a period of monitoring and assessment should now occur as experience increases. Indeed, these problems and questions have been examined by the Board because of its experience as the first Board of Review and have led to the observations and analysis in the first four chapters dealing with improvements in the existing machinery.

In some respects it may be premature therefore to undertake a fundamental reassessment with so little experience with respect to the present Act. Nevertheless, the Board was asked to offer its recommendations in the context of possible new legislation which may be developed in relation to environmental protection. This the Board has done .

Given the sensitivity and importance of the public participation question which dominates so much of the environmental-consumer regulation debate, the Board suggests that it would be desirable for this Report to be offered to the public for general comment from which government itself is likely to be a principal beneficiary.

## GENERAL CONCLUSIONS

This Second Report does not explore entirely new realms of public anxiety and its satisfaction. Already, as indicated, a growing framework of federal and provincial machinery exists to deal with regulations in the environment-consumer family of legislation and orders and this experience suggests a healthy beginning for the emergence of Canadian policy and practices, both federal and provincial. To the extent, however, that the present inquiry had its mandate phrased more narrowly than broadly, the foregoing pages are not overly ambitious in the ground that is covered even though they open the door to some new procedures and to more generous concepts of public involvement in an attempt to deal fairly with the many interests that touch upon environmental systems now increasingly regulated by Government. It would not have been appropriate for this Report to have developed some general theory or synthesis of regulation-making, its costs and the role of public participation aspects such as may be found in the Economic Council of Canada's Interim Report which so recently viewed many aspects of regulation-making in general. Yet clearly what was done by the Economic Council points the way to a parallel need for studies emphasizing the juridical-administrative components and focussing particularly on the environmental-consumer complex of rule-making that now so heavily occupies the interests of the general public, of industry, and of government itself.



Finally, while there appear to be emerging sporadic systems and procedures for public involvement in the environmental field of regulation-making, it is quite clear that no general pattern has begun to emerge. Indeed, there are a number of areas where public demand is growing for a participatory role, e.g. the nuclear power debate, pesticides, food additives and waste disposal problems including siting and destruction.

This Report cannot, therefore, answer more than what it has been asked to do by its mandate, or within the time available to it. There is also the rather limited perspective from which the enquiry itself has proceeded -- namely the Environmental Contaminants Act. Yet if the public is to be well served in the future, a review of the legal-administrative options, comparable in depth to the general study of the Economic Council, will be necessary if the patterns of tomorrow's decision-making opportunities in the environmental era are to be explored with imagination, understanding and compassion.



APPENDIX A

ENVIRONMENTAL CONTAMINANTS ACT



## 23-24 ELIZABETH II

## 23-24 ELIZABETH II

## CHAPTER 72

## CHAPITRE 72

An Act to protect human health and the environment from substances that contaminate the environment

Loi ayant pour objet de protéger la santé et l'environnement contre les contaminants

[Assented to 2nd December, 1975]

[Sanctionné le 2 décembre 1975]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

## SHORT TITLE

## TITRE ABRÉGÉ

Short  
title

1. This Act may be cited as the *Environmental Contaminants Act*.

1. La présente loi peut être citée sous le titre: *Loi sur les contaminants de l'environnement*.

Titre  
abrégé

## INTERPRETATION

## INTERPRÉTATION

Definitions

2. (1) In this Act,

2. (1) Dans la présente loi,

Définitions

"analyst"  
«analyste»

"analyst" means a person designated as an analyst pursuant to subsection 9(1);

«analyste» signifie une personne désignée comme analyste en application du paragraphe 9(1);

«analyste»  
"analyst"

"class of  
substances"  
«caté-  
gorie...»

"class of substances" means any two or more substances that

«annexe» désigne l'annexe à la présente loi que le gouverneur en conseil peut modifier

«annexe»  
"schedule"

(a) contain the same chemical moiety, or

a) soit en y ajoutant des substances ou catégories de substances, conformément au paragraphe 7(1),

(b) have similar chemical properties and the same type of chemical structure;

b) soit en en retranchant des substances ou catégories de substances, conformément au paragraphe 7(7);

"inspector"  
«inspecteur»

"inspector" means a person designated as an inspector pursuant to subsection 9(1);

«catégorie de substances» désigne tout groupe de deux substances ou plus

«catégorie  
de  
substances»  
"class..."

"Minister"  
«Ministre»

"Minister" means the Minister of the Environment;

a) qui comportent la même portion chimique, ou



"prescribed" «prescrit»	"prescribed" means prescribed by regulation;
"release" «rejet»	"release" includes spilling, leaking, pumping, spraying, pouring, emitting, emptying, throwing or dumping;
"schedule" «annexe»	"schedule" means the schedule to this Act to which the Governor in Council may <ul style="list-style-type: none"> <li>(a) add substances or classes of substances pursuant to subsection 7(1), and</li> <li>(b) delete substances or classes of substances pursuant to subsection 7(7).</li> </ul>
"substance" «substance»	"substance" means any distinguishable kind of inanimate matter <ul style="list-style-type: none"> <li>(a) capable of becoming dispersed in the environment, or</li> <li>(b) capable of becoming transformed in the environment into matter described in paragraph (a).</li> </ul>
Application of Act	(2) This Act is binding on Her Majesty in right of Canada or a province and any agent thereof.

## INFORMATION

3. (1) For the purpose of ascertaining whether any substances are entering or are likely to enter the environment in quantities that may constitute a danger to human health or the environment, the Minister may cause to be published in the *Canada Gazette* and in any other manner that he deems appropriate a notice requiring persons who import, manufacture or process or who intend to import, manufacture or process any substance specified therein or any substance that is a member of a class of substances specified therein to furnish the Minister with such information respecting quantities of such substances as is specified therein.

b) qui ont des propriétés chimiques semblables et le même genre de structure chimique;	
«inspecteur» signifie une personne désignée comme inspecteur en application du paragraphe 9(1);	«inspecteur» "inspector"
«Ministre» désigne le ministre de l'Environnement;	«Ministre» "Minister"
«prescrit» signifie prescrit par règlement;	«prescrit» "prescribed"
«rejet» comprend le versement, le déversement, l'écoulement, le pompage, l'arrosage, l'épandage, la vaporisation, l'évacuation, l'émission, le vidage, le jet ou le basculage;	«rejet» "release"
«substance» désigne toute sorte de matière inanimée susceptible <ul style="list-style-type: none"> <li>a) de se répandre dans l'environnement, ou</li> <li>b) de se transformer dans l'environnement en une matière visée à l'alinéa a).</li> </ul>	«substance» "substance"
(2) La présente loi lie Sa Majesté du chef du Canada ou d'une province, et tout mandataire de celle-ci.	Application de la loi

## RENSEIGNEMENTS

3. (1) Le Ministre peut, afin de savoir si des substances pénètrent dans l'environnement, ou sont susceptibles de le faire, en quantités éventuellement dangereuses pour celui-ci ou la santé, faire publier dans la *Gazette du Canada*, et de toute autre manière qu'il estime indiquée, un avis obligeant toute personne qui les importe, les fabrique ou les traite, ou a l'intention de le faire, au-delà d'une limite donnée pour chaque substance ou catégorie de substances, à lui donner, en ce qui concerne les quantités de ces substances, les renseignements qui y sont précisés.

Avis

(2) On publication of the notice described in subsection (1), every person shall comply therewith within such reasonable time or times as are specified therein if such person

(a) has, in the twelve-month period preceding publication thereof, imported, manufactured or processed, or

(b) intends, in the twelve-month period following publication thereof, to import, manufacture or process,

a substance specified in the notice or any substance that is a member of a class of substances specified in the notice in excess of a quantity specified therein in respect of that substance or class of substances as the case may be.

Minister  
may gather  
information

(3) Where the Minister or the Minister of National Health and Welfare suspects that a substance is entering or is likely to enter the environment in a quantity or concentration or under conditions that may constitute a danger to human health or the environment, the Minister or the Minister of National Health and Welfare may

(a) collect data and conduct investigations respecting

(i) the nature of the substance or of any class of substances of which it is a member,

(ii) the presence in the environment of the substance or of any class of substances of which it is a member and the effect of such presence on human health or the environment,

(iii) the extent to which the substance or any class of substances of which it is a member can become dispersed and will persist in the environment,

(iv) the ability of the substance or of any class of substances of which it is a member to become incorporated and to accumulate in biological tissues and to cause biological change,

(v) methods of controlling the presence in the environment of the sub-

(2) Est tenue de se conformer à l'avis mentionné au paragraphe (1), dès sa publication et dans les délais raisonnables qu'il précise, toute personne qui a,

a) au cours des douze mois précédents, importé, fabriqué ou traité, ou

b) au cours des douze mois suivants, l'intention d'importer, de fabriquer ou de traiter

une quantité, soit de l'une des substances, soit de l'une de celles appartenant à une catégorie, visées dans l'avis, supérieure à la quantité qu'indique celui-ci.

Observation  
de l'avis

(3) Lorsque le Ministre ou le ministre de la Santé nationale et du Bien-être social soupçonne qu'une substance pénètre ou est susceptible de pénétrer dans l'environnement en une quantité ou concentration ou dans des conditions qui peuvent mettre en danger la santé ou l'environnement, il peut

a) recueillir des données et faire des enquêtes

(i) sur la nature de cette substance ou de toute catégorie de substances dont elle fait partie,

(ii) sur la présence, dans l'environnement, de cette substance ou de toute catégorie de substances dont elle fait partie et sur l'effet de cette présence sur la santé et l'environnement,

(iii) sur la mesure dans laquelle cette substance ou toute catégorie de substances dont elle fait partie peut se répandre et restera dans l'environnement,

(iv) sur la capacité de cette substance ou de toute catégorie de substances dont elle fait partie de s'introduire dans les tissus biologiques et de causer des changements d'ordre biologique,

(v) sur les méthodes de contrôle de la présence, dans l'environnement, de

Le Ministre  
peut recueillir  
des renseignements

stance or of any class of substances of which it is a member, and

(vi) methods for testing the effects of the presence in the environment of the substance or of any class of substances of which it is a member;

(b) correlate and evaluate any data collected pursuant to paragraph (a) and publish results of any investigations carried out pursuant to that paragraph; and

(c) provide information and consultative services and make recommendations respecting measures to control the presence in the environment of the substance or of any class of substances of which it is a member.

cette substance ou de toute catégorie de substances dont elle fait partie, et (vi) sur les méthodes de vérification des effets de la présence, dans l'environnement, de cette substance ou de toute catégorie de substances dont elle fait partie;

b) mettre en corrélation et analyser les données recueillies en application de l'alinéa a) et publier les résultats des enquêtes effectuées en application de cet alinéa; et

c) fournir des renseignements et des services de consultation et faire des recommandations au sujet de mesures visant à limiter la présence, dans l'environnement, de cette substance ou de toute catégorie de substances dont elle fait partie.

Advisory  
committees

(4) The Minister and the Minister of National Health and Welfare may jointly appoint advisory committees to review any data collected pursuant to subsection (1) and paragraph (3)(a), to receive representations from interested parties or concerned members of the public and to advise the Minister and the Minister of National Health and Welfare respecting measures to control the presence in the environment of any substance or class of substances.

(4) Le Ministre et le ministre de la Santé nationale et du Bien-être social peuvent constituer conjointement des comités consultatifs chargés d'examiner des données recueillies en application du paragraphe (1) et de l'alinéa (3)a), de recevoir les observations de tous les intéressés et de conseiller le Ministre et le ministre de la Santé nationale et du Bien-être social au sujet de mesures visant à limiter la présence, dans l'environnement, de quelque substance ou catégorie de substances.

Comités  
consultatifs

Reports

(5) A committee appointed pursuant to subsection (4) shall make public its reports and recommendations with the reasons therefor.

(5) Un comité constitué en vertu du paragraphe (4) doit rendre publics ses rapports et recommandations et les raisons qui les motivent.

Rapports

Minister to  
make use of  
services of  
other depart-  
ments

(6) The Minister and the Minister of National Health and Welfare shall, in carrying out any activity described in paragraph (3)(a), wherever reasonably possible, act jointly and make use of the services and facilities of other departments of the Government of Canada or of any agencies thereof.

(6) Le Ministre et le ministre de la Santé nationale et du Bien-être social doivent toutes les fois qu'il est raisonnablement possible de le faire, dans l'exercice de toute activité visée à l'alinéa (3)a), agir conjointement et utiliser les services et installations des autres ministères du gouvernement du Canada ou de tout organisme de celui-ci.

Le Ministre  
utilise les  
services  
d'autres  
ministères

Minister to  
act in co-  
operation  
with gov-  
ernment, etc.

(7) The Minister and the Minister of National Health and Welfare may carry out any of the activities described in paragraph (3)(a) in cooperation with any government or agency thereof or any body, organization or person.

(7) Le Ministre et le ministre de la Santé nationale et du Bien-être social peuvent exercer toute activité visée à l'alinéa (3)a) en collaboration avec tout gouvernement, organisme gouvernemental ou groupe ou toute organisation ou personne.

Collabora-  
tion du  
Ministre  
avec un  
gouverne-  
ment, etc.



Agreements  
with  
provinces

(8) The Minister and the Minister of National Health and Welfare may, with the approval of the Governor in Council, enter into agreements with one or more provincial governments for the purpose of facilitating the collection of data and the conduct of investigations pursuant to paragraph (3) (a).

(8) Le Ministre et le ministre de la Santé nationale et du Bien-être social peuvent, avec l'approbation du gouverneur en conseil, conclure des accords avec un ou plusieurs gouvernements provinciaux en vue de faciliter la collecte de données et l'exécution d'enquêtes en application de l'alinéa (3) (a).

Accords  
avec les  
provinces

#### DISCLOSURE

Notice to  
disclose

4. (1) Where the Minister and the Minister of National Health and Welfare have reason to believe that a substance is entering or will enter the environment in a quantity or concentration or under conditions that they have reason to believe constitute or will constitute a significant danger to human health or the environment, the Minister may take any or all of the following steps:

(a) cause to be published in the *Canada Gazette* and in any other manner that the Minister deems appropriate a notice requiring any person engaged in any commercial, manufacturing or processing activity involving the substance or any member of a class of substances of which the substance is a member to notify the Minister thereof;

(b) send a written notice to any person engaged in any commercial, manufacturing or processing activity involving the substance or any member of a class of substances of which the substance is a member requiring him to furnish to the Minister such information specified in the notice relating to the substance or to any member of the class of substances specified in the notice as is in his possession or to which he may reasonably be expected to have access; and

(c) send a written notice to any person engaged in the importation or manufacturing of the substance or any product containing the substance requiring him to conduct such tests as are specified in the notice and as the Minister and the Minister of National Health and Welfare may reasonably require.

#### COMMUNICATION DE RENSEIGNEMENTS

4. (1) Lorsque le Ministre et le ministre de la Santé nationale et du Bien-être social ont des motifs de croire qu'une substance pénètre ou pénétrera dans l'environnement en une quantité ou concentration ou dans des conditions qui mettent ou mettront sensiblement en danger la santé ou l'environnement, le Ministre peut prendre les mesures suivantes ou l'une ou plusieurs d'entre elles:

a) faire publier dans la *Gazette du Canada* et de toute autre manière qu'il juge appropriée un avis exigeant que toute personne pratiquant des opérations commerciales, de fabrication ou de traitement qui mettent en cause cette substance ou toute substance appartenant à une catégorie de substances dont elle fait partie, en avise le Ministre;

b) envoyer à toute personne pratiquant des opérations commerciales, de fabrication ou de traitement qui mettent en cause cette substance ou toute substance appartenant à la catégorie de substances dont elle fait partie, un avis écrit exigeant qu'elle fournisse au Ministre, relativement à cette substance ou à toute substance appartenant à la catégorie de substances spécifiée dans l'avis, les renseignements y spécifiés qu'elle possède ou qu'il lui serait normalement possible d'obtenir; et

c) envoyer à toute personne qui se livre à l'importation ou à la fabrication de cette substance ou de tout produit contenant cette substance, un avis écrit exigeant qu'elle fasse les expériences y spécifiées que le Ministre et le ministre de la Santé nationale et du Bien-être social peuvent raisonnablement exiger.

Avia en-  
joignant de  
communiquer  
des  
renseigne-  
ments

Notice to  
be complied  
with

(2) Every person

(a) who, on publication of a notice referred to in paragraph (1)(a), is a person engaged in any commercial, manufacturing or processing activity involving the substance or any member of a class of substances specified in the notice, or

(b) to whom a notice referred to in paragraph (1)(b) or (c) has been sent

shall comply with the notice within such reasonable time or times as are specified therein.

Extension  
of time

(3) Notwithstanding subsection (2), the Minister may, upon request in writing from any person to whom a notice referred to in paragraph (1)(b) or (c) has been sent, extend the time or times within which the person shall comply with the notice.

Non-dis-  
closure of  
certain in-  
formation

(4) Any information received pursuant to subsection (1), subsection 3(2) or paragraph 3(3)(a) that relates to a formula or process by which any thing is manufactured or processed, whether patented or not, or to other trade secrets or that is sales or production information that has been specified, in writing, as information that is given in confidence shall not be disclosed except as may be necessary for the purposes of this Act.

"Class of  
substances"  
defined

(5) For the purposes of this section only, a "class of substances" means a class of substances whose members have similar physico-chemical or toxicological properties.

Mandatory  
reporting

(6) Where, during a calendar year, a person manufactures or imports a chemical compound in excess of five hundred kilograms and he manufactures or imports that compound in excess of that quantity for the first time, he shall, within three months

(2) Toute personne

a) qui, au moment de la publication de l'avis prévu à l'alinéa (1)a), pratique des opérations commerciales, de fabrication ou de traitement mettant en cause la substance spécifiée dans cet avis ou toute substance appartenant à une catégorie de substances y spécifiée, ou

b) à qui a été envoyé un avis prévu aux alinéas (1)b) ou c)

doit se conformer à l'avis ou aux avis en question dans le délai ou les délais raisonnables qui y sont indiqués.

(3) Nonobstant le paragraphe (2), le Ministre peut, à la demande, formulée par écrit, de toute personne qui a reçu un avis prévu aux alinéas (1)b) ou c), proroger le délai ou les délais qui lui sont donnés pour se conformer à cet avis.

(4) Nul renseignement reçu en application des paragraphes (1) ou 3(2) ou de l'alinéa 3(3)a) qui se rapporte soit à une formule ou à un procédé, brevetés ou non, utilisés pour la fabrication ou le traitement d'une chose quelconque, soit à d'autres secrets industriels, ou qui constitue un renseignement relatif aux ventes ou à la production au sujet duquel il a été spécifié par écrit qu'il était donné à titre confidentiel, ne doit être divulgué, si ce n'est dans la mesure où cela peut être nécessaire aux fins de la présente loi.

(5) Aux seules fins du présent article, une «catégorie de substances» est une catégorie constituée de substances ayant des propriétés physico-chimiques ou toxicologiques semblables.

(6) La personne qui, pour la première fois, fabrique ou importe, au cours d'une année civile, plus de cinq cents kilogrammes d'un composé chimique doit, dans les trois mois suivant la date de fabrication ou d'importation de ladite quantité, commu-

Obligation  
de se  
conformer  
à l'avis

Prorogation  
du délai

Non-divul-  
gation de  
certains  
renseigne-  
ments

Définition de  
«catégorie de  
substances»

Communi-  
cation  
obligatoire



of manufacturing or importing the said quantity, notify the Minister of the name of the compound, of the quantity manufactured or imported during that year and of any information in his possession respecting any danger to human health or the environment posed by the compound.

## CONSULTATION

Consultation  
with  
provinces  
and depart-  
ments or  
agencies

5. (1) Where the Minister and the Minister of National Health and Welfare are satisfied that a substance or class of substances is entering or will enter the environment in a quantity or concentration or under conditions that they are satisfied constitute or will constitute a significant danger in Canada or any geographical area thereof to human health or the environment, they shall, before making any recommendation to the Governor in Council under subsection 7(1), offer, as soon as reasonably practicable but no later than fifteen days after the said Ministers are so satisfied, to consult with

(a) the governments of any provinces that indicate that their provinces are likely to be materially affected by any such recommendation, and

(b) any departments or agencies of the Government of Canada as may be appropriate

in order to determine whether the significant danger perceived by them will be eliminated by any action taken or proposed to be taken pursuant to any other law.

Publication  
of proposed  
order and  
regulations

(2) Where, after consultation pursuant to subsection (1) or after an offer to consult has not been accepted within thirty days, the Minister and the Minister of National Health and Welfare are satisfied that the significant danger referred to in that subsection will not be eliminated by any action taken or proposed to be taken pursuant to any other law and they propose to recommend to the Governor in Council that

(a) an order amending the schedule by adding the substance or class of substances be made under subsection

7(1) au Ministre le nom du composé, la quantité fabriquée ou importée pendant l'année et tout renseignement qu'il possède concernant le danger que constitue le composé pour la santé ou l'environnement.

## CONSULTATION

Consultation  
avec les  
provinces,  
ministères  
ou  
organismes

5. (1) Lorsque le Ministre et le ministre de la Santé nationale et du Bien-être social sont convaincus qu'une substance ou une catégorie de substances pénètre ou pénétrera dans l'environnement en une quantité ou concentration ou dans des conditions qui mettent ou mettront sensiblement en danger la santé ou l'environnement au Canada ou dans quelque région du Canada, ils doivent, avant de faire une recommandation au gouverneur en conseil en vertu du paragraphe 7(1), offrir dans les meilleurs délais raisonnables mais au plus tard quinze jours après en avoir été convaincus, de consulter

a) tous les gouvernements provinciaux qui font état des répercussions importantes que cette recommandation entraîne vraisemblablement dans leur territoire, et

b) tous les ministères ou organismes du gouvernement du Canada dont il peut être à propos de prendre l'avis,

afin de déterminer si le danger qu'ils appréhendent sera éliminé par des mesures prises ou projetées en application de quelque autre loi.

(2) Lorsque, après avoir procédé aux consultations prévues au paragraphe (1), ou lorsqu'une offre de consultation n'est pas acceptée dans un délai de trente jours, le Ministre et le ministre de la Santé nationale et du Bien-être social sont convaincus que le danger visé par ce paragraphe ne sera pas éliminé par des mesures prises ou projetées en application de quelque autre loi, et se proposent de recommander au gouverneur en conseil

a) qu'un décret modifiant l'annexe en y ajoutant la substance ou catégorie de substances visée soit pris en vertu

Publication  
des projets  
de décrets  
et de  
règlements

7(1) and regulations relating to such substance or class of substances be made under any of paragraphs 18(a) to (e), or

(b) regulations that would modify or supplement in a material respect regulations relating to the substance or class of substances already made under any of paragraphs 18(a) to (e) be made,

the Minister shall cause to be published in the *Canada Gazette*,

(c) if paragraph (a) applies, a copy of the proposed order and regulations referred to in that paragraph, or

(d) if paragraph (b) applies, a copy of the proposed regulations referred to in that paragraph.

Notice of  
objection

(3) Any person having an interest therein may, within sixty days of publication in the *Canada Gazette* of a copy of any proposed order and regulations pursuant to paragraph (2)(c) or any proposed regulations pursuant to paragraph (2)(d), file a notice of objection with the Minister.

#### ENVIRONMENTAL CONTAMINANTS BOARD OF REVIEW

Establish-  
ment of  
Environ-  
mental Con-  
taminants  
Board of  
Review

6. (1) Upon receipt of a notice of objection referred to in subsection 5(3) within the time specified in that subsection, the Minister and the Minister of National Health and Welfare shall establish an Environmental Contaminants Board of Review (in this section referred to as a "Board") consisting of not less than three persons and shall refer the proposed order and regulations or the proposed regulations in respect of which the notice of objection was filed to the Board.

Duties

(2) A Board shall inquire into the nature and extent of the danger posed by the substance or class of substances to which any proposed order and regulations or proposed regulations referred to it under subsection

du paragraphe 7(1) et que des règlements relatifs à cette substance ou catégorie de substances soient établis en vertu d'un ou plusieurs des alinéas 18a) à e), ou

b) que des règlements modifiant ou complétant sur un point essentiel les règlements relatifs à la substance ou catégorie de substances visée déjà établis en vertu d'un ou plusieurs des alinéas 18a) à e) soient établis,

le Ministre doit faire publier dans la *Gazette du Canada*,

c) si l'alinéa a) s'applique, une copie du projet de décret et de règlements visé à cet alinéa; ou,

d) si l'alinéa b) s'applique, une copie du projet de règlements visé à cet alinéa.

Avis  
d'opposition

(3) Tout intéressé peut, dans les soixante jours de la publication, dans la *Gazette du Canada*, d'une copie de quelque projet de décret et de règlements publiée en application de l'alinéa (2)c), ou d'une copie de quelque projet de règlements publiée en application de l'alinéa (2)d), déposer un avis d'opposition entre les mains du Ministre.

#### COMMISSION D'ÉTUDE SUR LES CONTAMINANTS DE L'ENVIRONNEMENT

6. (1) Sur réception de l'avis d'opposition visé au paragraphe 5(3) dans le délai prévu par ce paragraphe, le Ministre et le ministre de la Santé nationale et du Bien-être social doivent établir une Commission d'étude sur les contaminants de l'environnement (appelée, au présent article, «Commission») composée d'au moins trois personnes et saisir cette Commission du projet de règlements ou du projet de décret et de règlements auquel se rapporte l'avis d'opposition.

Établisse-  
ment d'une  
Commission  
d'étude sur  
les contami-  
nants de  
l'environne-  
ment

Fonctions

(2) La Commission doit faire enquête sur la nature et l'étendue du danger que représente la substance ou catégorie de substances à laquelle s'applique le projet de règlements ou le projet de décret et de

(1) apply and in particular shall inquire into the matters described in subparagraphs 3(3)(a)(i) to (v), and shall give the person filing the notice of objection and any other interested or knowledgeable person a reasonable opportunity of appearing before the Board, presenting evidence and making representations to it.

règlements dont elle est saisie en vertu du paragraphe (1) et notamment sur les points visés aux sous-alinéas 3(3)a)(i) à (v), et elle doit donner à la personne qui a déposé l'avis d'opposition et à toute personne intéressée ou bien informée la possibilité raisonnable de comparaître devant elle et de lui présenter une preuve et des observations.

Powers	(3) For the purposes of an inquiry under subsection (2), a Board has and may exercise all the powers of a person appointed as a commissioner under Part I of the <i>Inquiries Act</i> .	(3) Aux fins d'une enquête effectuée en vertu du paragraphe (2), la Commission possède et peut exercer tous les pouvoirs d'une personne nommée pour exercer les fonctions de commissaire sous le régime de la Partie I de la <i>Loi sur les enquêtes</i> .	Pouvoirs
Report	(4) A Board, as soon as possible after the conclusion of an inquiry, shall submit a report to the Minister and the Minister of National Health and Welfare, together with its recommendations and all evidence that was before the Board.	(4) Toute Commission doit, aussitôt que possible après la fin de son enquête, présenter un rapport au Ministre et au ministre de la Santé nationale et du Bien-être social, ainsi que ses recommandations et l'ensemble de la preuve dont elle a pris connaissance.	Rapport
Publication of report	(5) The report of a Board shall, within thirty days after its receipt by the Minister and the Minister of National Health and Welfare, be made public unless the Board states in writing that it believes the public interest would be better served by withholding publication, in which case the Minister and the Minister of National Health and Welfare may decide whether the report, either in whole or in part, should be made public.	(5) Le rapport d'une Commission doit être rendu public dans les trente jours de sa réception par le Ministre et le ministre de la Santé nationale et du Bien-être social, à moins que la Commission ne déclare par écrit qu'elle croit que l'intérêt public serait mieux servi si le rapport n'était pas publié, auquel cas le Ministre et le ministre de la Santé nationale et du Bien-être social peuvent décider s'il y a lieu ou non de le rendre public, en totalité ou en partie.	Publication du rapport

## SCHEDULE

## ANNEXE

Addition to schedule, etc	7. (1) Subject to subsection (2), where the Governor in Council, on the recommendation of the Minister and the Minister of National Health and Welfare, is satisfied that a substance or class of substances is entering or will enter the environment in a quantity or concentration or under conditions that he is satisfied constitute	7. (1) Sous réserve du paragraphe (2), lorsque le gouverneur en conseil, à la suite d'une recommandation du Ministre et du ministre de la Santé nationale et du Bien-être social, est convaincu qu'une substance ou une catégorie de substances pénétre ou pénétrera dans l'environnement en une quantité ou concentration ou dans des con-	Ajouts à la liste, etc
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or will constitute a significant danger in Canada or any geographical area thereof to human health or the environment, he may, by order, add to the schedule the substance or class of substances.

ditions qui mettent ou mettront sensiblement en danger la santé ou l'environnement au Canada ou dans quelque région du Canada, il peut, par décret, ajouter à l'annexe cette substance ou catégorie de substances.

Order  
subject to  
conditions

(2) The Governor in Council may only make the order referred to in subsection (1) if any report of an Environmental Contaminants Board of Review established as a result of publication required under paragraph 5(2)(c) or (d) has been received by the Minister and the Minister of National Health and Welfare pursuant to subsection 6(4).

(2) Le gouverneur en conseil ne peut établir le décret visé au paragraphe (1) que si un rapport d'une Commission d'étude sur les contaminants de l'environnement établie par suite de la publication, exigée en vertu des alinéas 5(2)c) ou d), a été reçu par le Ministre et le ministre de la Santé nationale et du Bien-être social en application du paragraphe 6(4).

Conditions  
préalables  
à l'établisse-  
ment du  
décret

Emergency

(3) Where the Governor in Council is satisfied that a substance or class of substances is entering or will enter the environment in a quantity or concentration or under conditions that he is satisfied require immediate action to prevent a significant danger in Canada or any geographical area thereof to human health or the environment, he may, notwithstanding that no consultations have taken place pursuant to subsection 5(1) with respect to the substance or class of substances and that no copy of any proposed order and regulations or proposed regulations have been published in the *Canada Gazette* pursuant to subsection 5(2), make such order and regulations or regulations.

(3) Lorsque le gouverneur en conseil est convaincu qu'une substance ou une catégorie de substances pénètre ou pénétrera dans l'environnement en une quantité ou concentration ou dans des conditions qui exigent que des mesures soient prises immédiatement pour empêcher que la santé ou l'environnement soit sensiblement mis en danger au Canada ou dans quelque région du Canada, il peut, même s'il n'a pas été procédé à des consultations en application du paragraphe 5(1) relativement à cette substance ou catégorie de substances et même si nulle copie de projet de règlements ou de projet de décret et de règlements n'a été publiée dans la *Gazette du Canada* en application du paragraphe 5(2), établir ce décret et ces règlements ou ce règlement.

Urgence

Reference of  
order and  
regulations

(4) Where the Governor in Council has made any order and regulations or regulations pursuant to subsection (3), any person having an interest therein may, within sixty days of publication thereof in the *Canada Gazette*, file a notice of objection with the Minister.

(4) Lorsque le gouverneur en conseil a établi des règlements ou un décret et des règlements en application du paragraphe (3), tout intéressé peut, dans les soixante jours de leur publication dans la *Gazette du Canada*, déposer un avis d'opposition entre les mains du Ministre.

Examen du  
décret et  
des  
règlements

Establish-  
ment of  
Board

(5) Upon receipt of a notice of objection referred to in subsection (4) within the time specified in that subsection, the Minister and the Minister of National Health and Welfare shall establish an

(5) Sur réception de l'avis d'opposition visé au paragraphe (4) dans le délai prévu par ce paragraphe, le Ministre et le ministre de la Santé nationale et du Bien-être social doivent établir une Commission d'étude sur

Établisse-  
ment d'une  
Commission



Environmental Contaminants Board of Review consisting of not less than three persons and shall refer any order and regulations or regulations in respect of which the notice of objection was filed to the Board.

les contaminants de l'environnement composée d'au moins trois personnes et saisir cette Commission des règlements ou du décret et des règlements auxquels se rapporte l'avis d'opposition.

Provisions  
made  
applicable

(6) Subsections 6(2) to (5) apply to an inquiry held by an Environmental Contaminants Board of Review established pursuant to subsection (5) of this section with such modifications as the circumstances require.

(6) Les paragraphes 6(2) à (5) s'appliquent, avec les modifications qu'exigent les circonstances, à une enquête tenue par une Commission d'étude sur les contaminants de l'environnement établie en application du paragraphe (5) du présent article.

Dispositions  
applicables

Deletion  
from  
schedule

(7) \*Where the Governor in Council is satisfied that the inclusion of a substance or class of substances in the schedule is no longer necessary, he may, by order, delete from the schedule such substance or class of substances.

(7) Lorsque le gouverneur en conseil est convaincu qu'il n'est plus nécessaire qu'une substance ou une catégorie de substances figure sur la liste, il peut, par décret, retrancher de l'annexe cette substance ou catégorie de substances.

Radiation  
de l'annexe

#### OFFENCES

#### INFRACTIONS

Release

8. (1) No person shall, in the course of a commercial, manufacturing or processing activity, wilfully release, or permit the release of, a substance specified in the schedule or any substance that is a member of a class of substances specified in the schedule into the environment in any geographical area prescribed in respect of that substance or class of substances or, if no geographical area is so prescribed, in Canada,

8. (1) Nul ne doit, délibérément, dans le cadre d'opérations commerciales, de fabrication ou de traitement, rejeter ou permettre que soit rejetée dans l'environnement une substance figurant à l'annexe ou quelque substance appartenant à une catégorie de substances qui y figure, dans une région prescrite relativement à cette substance ou catégorie de substances ou, si aucune région n'est ainsi prescrite, au Canada,

Rejet

(a) in a quantity or concentration that exceeds the maximum quantity or concentration prescribed in respect of that substance or class of substances for the purpose of this paragraph; or

a) en une quantité ou concentration qui dépasse la quantité ou concentration maximale fixée par règlement relativement à cette substance ou catégorie de substances aux fins du présent alinéa; ou  
b) dans des conditions déterminées par règlement relativement à cette substance ou catégorie de substances aux fins du présent alinéa.

(b) under conditions prescribed in respect of such substance or class of substances for the purpose of this paragraph.



Import, manufacture, etc	(2) Subject to subsection (3), no person shall, for a commercial, manufacturing, or processing use prescribed for the purpose of this subsection, import, manufacture, process, offer for sale or knowingly use a substance specified in the schedule or any substance that is a member of a class of substances specified in the schedule in any geographical area prescribed in respect of such substance or class of substances or, if no geographical area is so prescribed, in Canada.	(2) Sous réserve du paragraphe (3), nul ne doit importer, fabriquer, traiter, mettre en vente ou utiliser sciemment une substance figurant à l'annexe, ou quelque substance appartenant à une catégorie qui y figure, destinée aux opérations commerciales, de fabrication ou de traitement, déterminées par règlement pour l'application du présent paragraphe, dans les régions déterminées par règlement pour chaque substance ou catégorie de substances ou, à défaut, au Canada.	Importation, fabrication, etc.
Exception	(3) Subsection (2) does not apply to any commercial, manufacturing or processing use prescribed for the purpose of that subsection involving a material that includes a substance specified in the schedule or any substance that is a member of a class of substances specified in the schedule if such substance is adventitiously present in the material and does not exceed a quantity or concentration consistent with good manufacturing practice.	(3) Le paragraphe (2) ne s'applique pas aux opérations commerciales, de fabrication ou de traitement déterminées par règlement qui portent sur une matière qui contient fortuitement une substance figurant à l'annexe ou quelque substance appartenant à une catégorie qui y figure, pourvu que la quantité contenue ou le degré de concentration soient conformes aux usages normaux de l'industrie.	Exception
Products	(4) No person shall import, manufacture or knowingly offer for sale a product that contains a substance specified in the schedule or any substance that is a member of a class of substances specified in the schedule in a quantity or concentration that exceeds the maximum quantity or concentration prescribed in respect of that substance or class of substances in relation to such product for the purpose of this subsection.	(4) Nul ne doit importer, fabriquer ni sciemment mettre en vente un produit qui contient une substance figurant sur l'annexe ou quelque substance appartenant à une catégorie de substances qui y figure, en une quantité ou concentration qui dépasse la quantité ou concentration maximale fixée par règlement relativement à cette substance ou catégorie de substances, pour ce produit, aux fins du présent paragraphe.	Produits
Offences	(5) Every person who contravenes this section is guilty of an offence and is liable (a) on summary conviction, to a fine not exceeding one hundred thousand dollars; or (b) on conviction upon indictment, to imprisonment for two years.	(5) Quiconque contrevient au présent article est coupable d'une infraction et passible, a) sur déclaration sommaire de culpabilité, d'une amende maximale de cent mille dollars; ou b) sur déclaration de culpabilité à la suite d'une mise en accusation, d'un emprisonnement de deux ans.	Infractions

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Time  
limit

(6) No proceedings in respect of an offence punishable on summary conviction under this section may be instituted after one year from the time when the subject-matter of the proceedings arose.

(6) Il ne peut être engagé de procédure relativement à une infraction punissable sur déclaration sommaire de culpabilité en vertu du présent article plus d'un an après la date à laquelle s'est produit le fait pouvant y donner lieu.

Prescription

Continuing  
offences

(7) Where an offence under subsection (1) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

(7) L'infraction visée au paragraphe (1) est censée constituer une infraction distincte chaque jour où elle est commise ou se perpétue.

Infractions  
prolongées

## INSPECTORS AND ANALYSTS

Inspectors  
and analysts

9. (1) The Minister may designate as an inspector or analyst for the purposes of this Act any person who, in his opinion, is qualified to be so designated.

9. (1) Le Ministre peut désigner pour occuper la fonction d'inspecteur ou d'analyste, aux fins de la présente loi, toute personne qu'il estime compétente pour occuper cette fonction.

Inspecteurs  
et analystesInspector  
to show  
certificate  
of  
designation

(2) An inspector shall be furnished with a certificate of his designation as an inspector and on entering any place pursuant to subsection 10(1) shall, if so required, produce the certificate to the person in charge thereof.

(2) Un inspecteur doit être pourvu d'un certificat de nomination à cette fonction, et lorsqu'il entre dans un lieu en application du paragraphe 10(1), il doit, s'il en est requis, produire le certificat à la personne qui a la charge de ce lieu.

L'inspecteur  
doit produire  
le certificat  
de  
nomination

## INSPECTION

Search

10. (1) An inspector may at any reasonable time enter any place in which he reasonably believes there is any substance or product by means of or in relation to which any provision of this Act has been contravened and may, where he has reason to believe it is necessary to do so for any purpose relating to the enforcement of this Act,

(a) examine any substance or product found therein;

(b) open and examine any receptacle or package found therein that he has reason to believe contains any substance or any substance of a class of substances specified in the schedule or any product containing any such substance; and

(c) examine any books, reports, records, shipping bills and bills of lading or other

## INSPECTION

10. (1) Un inspecteur peut, à tout moment raisonnable, entrer dans un lieu lorsqu'il a des raisons de croire qu'il s'y trouve un produit ou une substance au moyen ou au sujet duquel ou de laquelle il a été contrevenu à une disposition de la présente loi, et il peut, lorsqu'il a des raisons de croire que cela est nécessaire, à quelque égard, pour l'application de la présente loi,

a) examiner toute substance ou tout produit qui s'y trouve;

b) ouvrir et examiner tout récipient ou paquet qui s'y trouve et dans lequel il a des raisons de croire qu'il y a une substance figurant à l'annexe ou une substance appartenant à une catégorie de substances qui y figure ou un produit contenant une telle substance; et

Perquisition

documents or papers that on reasonable grounds he believes contain any information relevant to the enforcement of this Act and make copies thereof or extracts therefrom.

c) examiner les livres, rapports, registres, connaissements et feuilles d'expédition ou autres documents ou pièces qu'il croit, en se fondant sur des motifs raisonnables, contenir des renseignements pertinents pour l'application de la présente loi, et en prendre des copies ou des extraits.

Assistance  
to inspectors

(2) The owner or the person in charge of a place entered by an inspector pursuant to subsection (1) and every person found therein shall give the inspector all reasonable assistance in his power to enable the inspector to carry out his duties and functions under this Act and shall furnish him with such information with respect to the administration of this Act and the regulations as he may reasonably require.

(2) Le propriétaire ou la personne ayant la charge d'un lieu où un inspecteur entre en application du paragraphe (1) et toute personne qui s'y trouve doivent fournir toute l'aide raisonnable en leur pouvoir à l'inspecteur pour lui permettre d'exercer ses fonctions en vertu de la présente loi et lui fournir, en ce qui concerne l'application de la présente loi et des règlements, les renseignements qu'il peut raisonnablement exiger.

Aide à  
donner aux  
inspecteurs

Obstruction  
of inspectors

(3) No person shall obstruct or hinder an inspector in the carrying out of his duties and functions under this Act.

(3) Nul ne doit gêner ou empêcher un inspecteur dans l'exercice des fonctions que lui confère la présente loi.

Obstruction  
faite aux  
inspecteurs

#### SEIZURE AND DETENTION

#### SAISIE ET RÉTENTION

Seizure

11. (1) Whenever an inspector believes on reasonable grounds that any provision of this Act has been contravened, he may seize and detain any substance or product by means of or in relation to which he reasonably believes the contravention occurred.

11. (1) Chaque fois qu'un inspecteur croit, en se fondant sur des motifs raisonnables, qu'il a été contrevenu à une disposition de la présente loi, il peut saisir et retenir tout produit ou toute substance au moyen ou au sujet duquel ou de laquelle la contravention a été commise.

Saisie

Seizure  
limitation

(2) Except to the extent that the substance or product, or a sample thereof, is required as evidence or for purposes of analysis, an inspector shall not seize any substance or product pursuant to subsection (1) unless in his opinion such seizure is necessary in the public interest.

(2) Sauf dans la mesure où la substance ou le produit, ou un échantillon de ceux-ci, est nécessaire à titre de preuve ou aux fins d'analyse, un inspecteur ne doit saisir une substance ou un produit en application du paragraphe (1) que s'il estime cette saisie nécessaire dans l'intérêt public.

Restriction  
à la saisie

Notice of  
contra-  
vention

(3) Where an inspector has seized and detained any substance or product pursuant to subsection (1), he shall, as soon as practicable, advise the person in whose possession the substance or product was at the time of seizure of the provision of this Act that he believes has been contravened.

(3) Lorsqu'un inspecteur a saisi et retenu une substance ou un produit en application du paragraphe (1), il doit, dès que cela est matériellement possible, faire connaître, à la personne qui en avait la possession au moment de la saisie, la disposition de la présente loi qu'il croit avoir été enfreinte.

Avis de  
violation

Detention  
and  
release

(4) Any substance or product seized pursuant to subsection (1) shall not be detained

- (a) after an inspector or the Minister, upon application made to him by the owner of the substance or product or by the person in whose possession the substance or product was at the time of seizure, is satisfied that it is not necessary in the public interest to continue to detain such substance or product, except to the extent that the substance or product, or a sample thereof, is required as evidence or for purposes of analysis; or
- (b) after the expiration of sixty days from the day of seizure, unless before that time

- (i) the substance or product has been forfeited pursuant to section 13,
- (ii) proceedings have been instituted in respect of the contravention in relation to which the substance or product was seized, in which event the substance or product may be detained until the proceedings are finally concluded, or
- (iii) notice of an application for an order extending the time during which the substance or product may be detained has been served in accordance with section 12.

Storing of  
seized  
substance  
or product

(5) A substance or product seized by an inspector pursuant to subsection (1) shall be kept or stored in the building or place where it was seized except where, in the opinion of the inspector, it is not in the public interest to do so, because such substance or product or a sample thereof is required as evidence or because the person in whose possession the substance or product was at the time of seizure or the person entitled to possession of the place requests the inspector that it be removed to some other place, in which case such substance or product may be removed to and stored

(4) Une substance ou un produit saisis en application du paragraphe (1) ne doivent plus être retenus

- a) dès qu'un inspecteur ou le Ministre, à la suite d'une demande que lui présente le propriétaire de la substance ou du produit ou la personne qui en avait la possession au moment de la saisie, est convaincu qu'il n'est pas nécessaire, dans l'intérêt public, d'en poursuivre la rétention, sauf dans la mesure où cette substance ou ce produit, ou un échantillon de ceux-ci, est nécessaire à titre de preuve ou à des fins d'analyse; ou
- b) dès l'expiration d'un délai de soixante jours à partir de la date de la saisie, sauf si, avant cela,

- (i) la substance ou le produit ont été confisqués en application de l'article 13,
- (ii) des procédures ont été intentées relativement à la contravention ayant donné lieu à la saisie de la substance ou du produit, auquel cas la substance ou le produit peuvent être retenus jusqu'à la fin des procédures, ou
- (iii) un avis de demande d'ordonnance prolongeant le délai de rétention de la substance ou du produit a été signifié conformément à l'article 12.

(5) Une substance ou un produit saisis par un inspecteur en application du paragraphe (1) doivent être gardés ou emmagasinés dans le bâtiment ou le lieu où ils ont été saisis, sauf lorsque, de l'avis de l'inspecteur, cela n'est pas d'intérêt public, parce que cette substance ou ce produit ou un échantillon de ceux-ci sont nécessaires à titre de preuve ou parce que la personne qui avait la possession de la substance ou du produit au moment de la saisie ou la personne ayant droit à la possession du lieu en question demande à l'inspecteur de les placer ailleurs; dans ce cas, cette sub-

Retention  
and  
release

Emmagasi-  
nage de la  
substance  
ou du  
produit  
saisis



in any other place at the direction of or with the concurrence of an inspector and at the expense of the person who requested that it be so removed.

Interference  
with seized  
substance  
or product

(6) Unless authorized by an inspector, no person shall remove, alter or interfere in any way with any substance or product seized and detained by an inspector pursuant to subsection (1) but an inspector shall, at the request of the person from whom the substance or product was seized, allow that person or any person authorized by that person to examine the substance or product so seized and, where practicable, furnish a sample thereof to such person.

Application  
to extend  
period of  
detention

12. (1) Where proceedings have not been instituted in respect of the contravention in relation to which any substance or product was seized pursuant to subsection 11(1), the Minister may, before the expiration of sixty days from the day of seizure and upon the serving of prior notice in accordance with subsection (2) on the owner of the substance or product or on the person in whose possession the substance or product was at the time of seizure, apply to a magistrate within whose territorial jurisdiction the seizure was made for an order extending the time during which the substance or product may be detained.

Notice

(2) The notice referred to in subsection (1) shall be served by personal service at least five clear days prior to the day on which the application is to be made to the magistrate or by registered mail at least seven clear days prior to that day and shall specify

(a) the magistrate to whom the application is to be made;

(b) the place where and the time when the application is to be heard, which time shall be not later than ten days after service of the notice;

stance ou ce produit peuvent être déplacés et emmagasinés en tout autre lieu sur l'ordre ou avec l'accord d'un inspecteur, aux frais de la personne qui en a demandé le déplacement.

(6) A moins d'y être autorisé par un inspecteur, nul ne doit enlever, modifier ni manipuler de quelque façon une substance ou un produit saisis et retenus par un inspecteur en application du paragraphe (1); mais un inspecteur doit, à la demande de la personne entre les mains de laquelle la substance ou le produit ont été saisis, permettre à cette personne ou à toute personne autorisée par elle d'examiner cette substance ou ce produit et, lorsque cela est matériellement possible, lui en fournir un échantillon.

Manipulation  
de la  
substance  
ou du  
produit  
saisis

12. (1) Lorsqu'il n'a pas été intenté de procédure relativement à la contravention ayant donné lieu à la saisie d'une substance ou d'un produit en application du paragraphe 11(1), le Ministre peut, dans les soixante jours qui suivent la date de la saisie et sur signification d'un préavis, conformément au paragraphe (2), au propriétaire de la substance ou du produit ou à la personne qui en avait la possession au moment de la saisie, demander à un magistrat dans le ressort duquel la saisie a été effectuée une ordonnance prolongeant le délai de rétention de cette substance ou de ce produit.

Demande de  
prolonga-  
tion du délai  
de rétention

(2) Le préavis mentionné au paragraphe (1) doit être signifié à la personne, cinq jours francs au moins avant la date où la demande doit être présentée au magistrat, ou par courrier recommandé, sept jours francs au moins avant cette date, et doit spécifier

a) à quel magistrat la demande sera présentée;

b) où et quand la demande sera entendue, la date d'audition devant se situer dans les dix jours suivant la signification du préavis;

Préavis



(c) the substance or product in respect of which the application is to be made; and

(d) the evidence upon which the Minister intends to rely to show why the time during which the substance or product may be detained should be extended.

c) à quelle substance ou quel produit se rapporte la demande; et

d) quelle preuve le Ministre entend invoquer pour justifier la prolongation du délai de rétention de la substance ou du produit.

Order of  
extension  
granted

(3) Where, upon the hearing of an application made under subsection (1), the magistrate is satisfied that the substance or product seized should continue to be detained, he shall order that the substance or product be detained for such additional period of time and upon such conditions relating to the detention for that additional period of time as he deems proper and that upon the expiration of such period of time the substance or product be restored to the person from whom it was seized or to any other person entitled to possession thereof unless before the expiration of such period of time subparagraph 11(4)(b)(i) or (ii) applies.

(3) Lorsque, à la suite de l'audition d'une demande présentée en vertu du paragraphe (1), le magistrat est convaincu qu'il y a lieu de ne pas mettre fin à la rétention de la substance ou du produit saisis, il doit ordonner que la substance ou le produit soient retenus pendant tel délai supplémentaire et à telles conditions relatives à la rétention qu'il juge appropriés, et qu'à l'expiration de ce délai la substance ou le produit soient restitués à la personne entre les mains de laquelle ils ont été saisis ou à toute autre personne ayant le droit d'en avoir la possession, à moins que, avant l'expiration de ce délai, les sous-alinéas 11(4)b)(i) ou (ii) ne s'appliquent.

Ordonnance  
de  
prolongation

Order of  
extension  
refused

(4) Where, upon the hearing of an application made under subsection (1), the magistrate is not satisfied that the substance or product seized should continue to be detained, he shall order that the substance or product be restored to the person from whom it was seized or to any other person entitled to possession thereof upon the expiration of sixty days from the day of seizure unless,

(4) Lorsque, à la suite de l'audition d'une demande présentée en vertu du paragraphe (1), le magistrat n'est pas convaincu qu'il y ait lieu de ne pas mettre fin à la rétention de la substance ou du produit saisis, il doit ordonner que la substance ou le produit soient restitués à la personne entre les mains de laquelle ils ont été saisis ou à toute autre personne ayant le droit d'en avoir la possession, à l'expiration d'un délai de soixante jours à partir de la date de la saisie, à moins que

Refus de  
rendre une  
ordonnance  
de  
prolongation

(a) before the expiration of such period of time, subparagraph 11(4)(b)(i) or (ii) applies; or

(b) at the time of the hearing, such period of time has then expired in which event he shall order the restoration thereof forthwith to the person from whom it was seized or to any other person entitled to possession thereof.

a) les sous-alinéas 11(4)b)(i) ou (ii) ne s'appliquent avant l'expiration de ce délai; ou que

b) ce délai ne soit arrivé à son terme au moment de l'audition, auquel cas il doit en ordonner la restitution immédiate à la personne entre les mains de laquelle ils ont été saisis ou à toute autre personne ayant le droit d'en avoir la possession.

"Magistrate"  
defined

(5) In this section, "magistrate" means a magistrate as defined in the *Criminal Code*.

(5) Au présent article, «magistrat» désigne le magistrat défini par le *Code criminel*.

Définition de  
«magistrat»

## FORFEITURE

Forfeiture  
ou consent

13. (1) Where an inspector has seized any substance or product pursuant to subsection 11(1) and the owner thereof or the person in lawful possession thereof at the time of seizure consents in writing at the request of the inspector to the forfeiture of the substance or product, such substance or product is thereupon forfeited to Her Majesty.

Forfeiture  
by order  
of court

(2) Where a person is convicted of an offence under this Act and any substance or product seized pursuant to subsection 11(1) by means of or in relation to which the offence was committed is then being detained, such substance or product

(a) is, upon such conviction, in addition to any punishment imposed for the offence, forfeited to Her Majesty if such forfeiture is directed by the court; or

(b) shall, upon the expiration of the time for taking an appeal from the conviction or upon the final conclusion of the proceedings, as the case may be, be restored to the person from whom it was seized or to any other person entitled to possession thereof upon such conditions, if any, as may be imposed by order of the court and as, in the opinion of the court, are necessary to avoid the commission of any further offence under this Act.

Articles  
deemed not  
to have been  
seized

(3) For the purposes of subsection (2), any substance or product released from detention pursuant to paragraph 11(4)(a) or (b) shall be deemed not to have been seized pursuant to subsection 11(1).

## GENERAL

Officers,  
etc. of  
corporations

14. Where a corporation commits an offence under section 8 or 17, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission

## CONFISCATION

Confiscation  
par consente-  
ment

13. (1) Lorsqu'un inspecteur a saisi une substance ou un produit en application du paragraphe 11(1) et que, à la demande de l'inspecteur, la personne qui en est propriétaire ou la personne qui en avait légalement la possession au moment de la saisie consent par écrit à sa confiscation, cette substance ou ce produit est immédiatement confisqué au profit de Sa Majesté.

(2) Lorsqu'une personne est déclarée coupable d'une infraction prévue par la présente loi et qu'une substance ou un produit saisis en application du paragraphe 11(1), au moyen ou au sujet desquels l'infraction a été commise, sont alors retenus, la substance ou le produit

a) sont, après cette déclaration de culpabilité, et en sus de toute peine imposée pour l'infraction, confisqués au profit de Sa Majesté si le tribunal l'ordonne; ou

b) doivent, à l'expiration du délai prévu pour porter la condamnation en appel, ou à la fin des procédures, selon le cas, être restitués à la personne entre les mains de laquelle ils ont été saisis ou à toute autre personne ayant le droit d'en avoir la possession, aux conditions, s'il en est, que le tribunal peut fixer par ordonnance et qui, de l'avis de ce dernier, sont nécessaires pour éviter que soit de nouveau commise une infraction prévue par la présente loi.

(3) Aux fins du paragraphe (2), une substance ou un produit restitués en application des alinéas 11(4)a) ou b) sont réputés ne pas avoir été saisis en application du paragraphe 11(1).

Confiscation  
par ordon-  
nance du  
tribunal

Articles  
réputés ne  
pas avoir  
été saisis

## DISPOSITIONS GÉNÉRALES

Dirigeants,  
etc., de  
corporations

14. Lorsqu'une corporation commet une infraction prévue par les articles 8 ou 17, tout dirigeant, administrateur ou mandataire de la corporation qui a ordonné ou autorisé la commission de l'infraction ou y a

of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

consenti, acquiescé ou participé est complice et coupable de l'infraction et passible, sur déclaration de culpabilité, de la peine prévue pour l'infraction, que la corporation ait ou non été poursuivie ou condamnée.

Proof of  
offence

15. In a prosecution of a person for an offence under section 8, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

15. Dans une poursuite intentée contre une personne pour une infraction prévue à l'article 8, il suffit, pour prouver l'infraction, d'établir qu'elle a été commise par un employé ou un mandataire de l'accusé, que cet employé ou mandataire soit ou non identifié ou qu'il ait été poursuivi ou non pour cette infraction, à moins que cet accusé n'établisse d'une part que l'infraction a été commise sans qu'il le sache ou y consente et d'autre part qu'il s'est dûment appliqué à la prévenir.

Preuve de  
l'infraction

Certificate  
of analyst

16. (1) Subject to this section, a certificate of an analyst stating that he has analyzed or examined a substance or product and stating the result of his analysis or examination is admissible in evidence in any prosecution for an offence under section 8 and in the absence of evidence to the contrary is proof of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

16. (1) Sous réserve des dispositions du présent article, un certificat d'un analyste déclarant qu'il a analysé ou examiné une substance ou un produit et indiquant le résultat de son analyse ou examen est admissible en preuve pour toute poursuite relative à une infraction prévue par l'article 8 et, sauf preuve contraire, fait foi des déclarations contenues dans le certificat sans qu'il soit nécessaire de prouver la signature ni la qualité officielle de la personne par laquelle il paraît avoir été signé.

Certificat  
d'analyste

Attendance  
of analyst

(2) The party against whom a certificate of an analyst is produced pursuant to subsection (1) may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

(2) La partie contre laquelle un certificat d'un analyste est produit en application du paragraphe (1) peut, avec l'autorisation du tribunal, exiger la présence de l'analyste pour contre-interrogatoire.

Présence de  
l'analyste

Notice

(3) No certificate shall be received in evidence pursuant to subsection (1) unless the party intending to produce it has given to the party against whom it is intended to be produced reasonable notice of such intention together with a copy of the certificate.

(3) Aucun certificat ne doit être admis en preuve en application du paragraphe (1) à moins que la partie qui entend le produire n'ait donné à la partie à laquelle elle entend l'opposer un avis suffisant de son intention de le faire, ainsi qu'une copie du certificat.

Avis



## OTHER OFFENCES

## AUTRES INFRACTIONS

Other offences

17. Every person who contravenes any provision of this Act, other than section 8, or of the regulations is guilty of an offence punishable on summary conviction.

Autres infractions

17. Quiconque contrevient à quelque disposition de la présente loi, sauf l'article 8, ou à quelque disposition des règlements est coupable d'une infraction punissable sur déclaration sommaire de culpabilité.

## REGULATIONS

## RÈGLEMENTS

Regulations

18. The Governor in Council may make regulations

Règlements

18. Le gouverneur en conseil peut établir des règlements

(a) prescribing for the purpose of paragraph 8(1)(a) the maximum quantity or concentration of a substance specified in the schedule or of any substance that is a member of a class of substances specified in the schedule that may be released into the environment in the course of any commercial, manufacturing or processing activity;

a) fixant, aux fins de l'alinéa 8(1)a), la quantité ou concentration maximale d'une substance figurant sur la liste, ou de toute substance appartenant à une catégorie de substances figurant sur la liste, qui peut être rejetée dans l'environnement dans le cadre d'opérations commerciales, de fabrication ou de traitement;

(b) prescribing for the purpose of paragraph 8(1)(b) the conditions under which a substance specified in the schedule or any substance that is a member of a class of substances specified in the schedule may not be released into the environment in the course of any commercial, manufacturing or processing activity;

b) déterminant, aux fins de l'alinéa 8(1)b), les conditions dans lesquelles une substance figurant sur la liste ou toute substance appartenant à une catégorie de substances qui y figure ne peut être rejetée dans l'environnement dans le cadre d'opérations commerciales, de fabrication ou de traitement;

(c) prescribing for the purpose of subsection 8(2) any commercial, manufacturing or processing uses in respect of which a substance specified in the schedule or any substance that is a member of a class of substances specified in the schedule may not be imported, manufactured, processed, offered for sale or used;

c) déterminant, aux fins du paragraphe 8(2), les usages entrant dans le cadre d'opérations commerciales, de fabrication ou de traitement pour lesquels une substance figurant sur la liste ou toute substance appartenant à une catégorie de substances qui y figure ne peut être importée, fabriquée, traitée, mise en vente ou utilisée;

(d) prescribing for the purpose of subsection 8(1) or (2) any geographical area in respect of a substance specified in the schedule or a class of substances specified in the schedule;

d) prescrivant, aux fins des paragraphes 8(1) ou (2), une région pour une substance figurant à l'annexe ou une catégorie de substances qui y figure;

e) fixant, aux fins du paragraphe 8(4), à l'égard de tout produit, la quantité ou concentration maximale de toute sub-

(e) prescribing for the purpose of subsection 8(4) in relation to any product the maximum quantity or concentration of any substance specified in the schedule or any substance that is a member of a class of substances specified in the schedule;

(f) respecting methods of sampling and analysis for determining the presence, quantity or concentration of any substance for the purposes of this Act;

(g) respecting the form and manner in which any information required pursuant to a notice under paragraph 4(1)(b) is to be submitted;

(h) respecting any tests required under paragraph 4(1)(c);

(i) requiring any person engaged in the importation, manufacturing or processing of any substance specified in the schedule or any substance that is a member of a class of substances specified in the schedule to maintain books and records and specifying for such purpose the form of such books and records;

(j) respecting the procedure to be followed by any committee appointed under subsection 3(4); and

(k) generally for carrying into effect the purposes and provisions of this Act.

stance figurant à l'annexe ou de toute substance appartenant à une catégorie de substances qui y figure;

f) concernant les méthodes d'échantillonnage et d'analyse ayant pour objet de déterminer la présence, la quantité ou la concentration de toute substance aux fins de la présente loi;

g) concernant la forme et le mode de présentation de tout renseignement exigé dans un avis donné en vertu de l'alinéa 4(1)b);

h) concernant les expériences exigées en vertu de l'alinéa 4(1)c);

i) exigeant que toute personne qui se livre à l'importation, à la fabrication ou à la transformation d'une substance figurant à l'annexe ou d'une substance appartenant à une catégorie de substances qui y figure, tienne des livres et des registres et spécifiant à cet effet la forme de ces livres et registres;

j) concernant la procédure à suivre par tout comité constitué en vertu du paragraphe 3(4); et,

k) en général, pour la réalisation des objets et l'application des dispositions de la présente loi.

#### COMMENCEMENT

Coming  
into force

19. This Act shall come into force on a day to be fixed by proclamation.

#### ENTRÉE EN VIGUEUR

19. La présente loi entrera en vigueur à une date qui sera fixée par proclamation. 30 Entrée en  
vigueur

#### SCHEDULE

#### ANNEXE





APPENDIX B

Mr. R.M. Robinson's Statement to the  
Board at the Public Hearing on December  
10, 1979.





Ottawa, Ontario  
K1A 1C8

DEC - 7 1979

Your file      Vite à l'attention

Our file      Notre référence

Professor Maxwell Cohen  
Chairman, PCB Board of Review  
1302 - 200 Rideau Terrace  
Ottawa, Ontario

Dear Professor Cohen:

The following is the text of a statement which I shall be making to the PCB Board of Review on December 10, 1979.

"Mr. Chairman, as you are aware this is the first occasion on which a Board of Review has been established under the authority of the Environmental Contaminants Act. You are also aware that the sequence of events following the appointment of yourself and the other two distinguished members to this Board is not a series of events addressed clearly by the legislation.

I would request, therefore, that the Board of Review include in your report those observations and suggestions which may be readily and quickly drawn from your experiences with the vagueness of the legislation encountered during the course of your executive meetings and this hearing. Your observations and suggestions could prove invaluable as advice for future courses of action taken by the government. These actions could include establishment and guidance of future Boards of Review and amendment of the legislation.

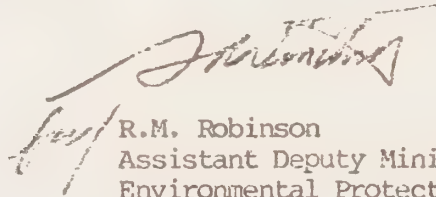
There are, in particular, two areas in which your comments and suggestions would be most valued. The first of these areas relates to the manner in which notices of objection considered to be frivolous might be dealt with without establishing a Board of Review. The second area of concern pertains to the course of action that should be taken in the situation where a Board is constituted and all Notices of Objection are withdrawn or the objectors fail to appear.

In closing this statement I wish to thank the Board for the opportunity to make this request."

- 2 -

This statement is a reflection of some of the concerns we have had after the notice of the hearings was published and the subsequent withdrawal of the objections to the proposed amendment of Chlorobiphenyl Regulations No.1.

Yours very truly,



R.M. Robinson  
Assistant Deputy Minister  
Environmental Protection Service



APPENDIX C

Extracts from the Transcripts of  
December 10, 1979 (pp.196-197) and  
March 13, 1980 (pp.1-4).



Ottawa, Ontario

Monday, December 10, 1979

CHAIRMAN: Thank you very much, Mr. Robinson. I have only one comment to make before perhaps I ask my colleagues to address any concerns they have over this interesting request to us which we were glad to take on.

We thought perhaps it might be advisable to ask you, in view of the Minister's desire to have, naturally, an early report from us on the substance as well as your desire to have reports from us on these important procedural and legislative observations we intend to make, that we perhaps speed up matters by dividing it in two parts. You can afford to wait a little while for part 2, the legislative

observations, the procedure. You wouldn't like to wait too long for the substantive response to the purpose for which this Board was established.

Would you agree then that it would make good sense for us to give you two reports; part 1 as quickly as possible in both languages officially on the substantive issues before us and part 2 on this last request you have made for our reflections on the better procedures that might be adopted and any amendments that we think are relevant? We could take a little time on part 2, but we would like to get on with part 1. How does that strike you?

R. ROBINSON: That strikes me as a very sensible suggestion.

Ottawa, Ontario

Thursday, March 13, 1980

--- On commencing at 10 a.m.

THE CHAIRMAN: The Board of Review will come to order,  
5 and I welcome the representative of the Government of Canada.  
I will apologize for the absence, briefly, of a Board member,  
Mr. Marwood, whose plane is not always predictable but who  
should be arriving any moment. I am sure he will have no objec-  
tions to the Board proceeding because of the importance of the  
10 occasion and the fact we have a number of senior officials here  
and we don't want to not get the chance to explore fully with  
them the purpose for which we are gathering.

May I introduce Professor Edward Ratushny of the  
Faculty of Law at the University of Ottawa who has been appointed  
15 to assist the Board with this second report. Professor Ratushny  
has had a long experience in the field of administrative law  
and administrative tribunals and is, therefore, able to look at  
the kinds of questions you put to us and we put to you in a  
rather substantial comparative way, and I am hopeful that he  
20 will be helpful both to the kind of issues you raise and the  
kind of problems we will face when we come to draft and put the  
final touches of research on our report.

I hope that Mr. Robinson, and gentlemen, will feel free  
in the course of the discussion to address any questions you may  
25 have of a technical nature not merely to the Board but to

Professor Ratushny as well.

The Government of Canada was good enough to invite this Board to engage in a rather interesting task of looking at the board system under the Environmental Contaminants Act, seeing  
5 what lessons we have learned from our own experience and then from those lessons try to see if one could have an objective view of the board system, its simplification, the development of standard rules and a whole series of related questions which would make succeeding boards come into being and operate with  
10 the least fuss and the maximum of low cost and high efficiency, if one could put it in those terms.

The Board has taken the view that it can do this best by sending a questionnaire out to the Government of Canada and to a number of other -- ah, here is Mr. Marwood. I will stop for a  
15 moment.

--- A short pause

THE CHAIRMAN: Welcome, Mr. Marwood. We were just making a few introductory remarks.

The questionnaire we sent to you is the same one we  
20 sent out, minus certain questions that had to do with internal housekeeping, to many organizations we thought might -- who were involved in the hearings, I may say, first of all, and secondly, who might be interested in what we are doing and have something to say. Our view was that we had to make a choice between regard  
25 ing ourselves as occupying a kind of advisory role to you rather



than a public hearing role and in a compromise between the way in which the matter came before us by way of a public hearing and Mr. Robinson's presentation to us on December 10th, some persons might have said you were obliged to go the public hearing route. We felt that going the public hearing route in this particular area might not be necessary and might be, indeed, conducive to expanding the nature of the proceedings beyond a reasonable limit at this time. So we substituted the idea of a questionnaire plus a direct discussion with a record thereof with the government as a necessary alternative. We hope you agree and we hope that out of it will come something just as efficient and just as effective as a public hearing might have provided. I think that with those few remarks, unless Mr. Marwood and Dr. Sutherland you have anything to add by way of an interruption?

DR. SUTHERLAND: No, not at the moment.

THE CHAIRMAN: Mr. Marwood?

MR. MARWOOD: Just I am sorry to be a little late.

THE CHAIRMAN: I know you have done your best.

MR. MARWOOD: The airline was a little late as usual.

THE CHAIRMAN: Well I congratulate you on getting here. Using Great Lakes is a very secure way of travel, but not always.

I would therefore ask you, Mr. Robinson, as leader of your team to be kind enough to open these proceedings.

MR. R.M. ROBINSON (Assistant Deputy Minister, Environmental Protection Service, Environment Canada): Thank you

very much, Mr. Chairman, for your introductory words and words of welcome. I might say at the outset that we entirely agree with the proceeding that you -- or procedure that you have decided to follow. We certainly do see you very much in the context of what we might call the second half of your task very much as a very well informed consultant and we do very much look forward to the recommendations, to the comments and interpretations that you will be offering to us.

We, of course, as you have just indicated, received along with others a very well presented questionnaire, a very thoughtful one and thought provoking one and I might tell you that a fair amount of time has gone into the consideration of the questions that you have raised in it and, indeed, I might tell you that I spent considerable time yesterday morning with Mr. Seaborn, our Deputy Minister, going over the proposed responses to your questions and he has authorized me to say today that while he is unable to be with us primarily because he is engaged in a series of briefings of our new minister, which you might expect, that he wanted to be here and he has authorized me to say that his judgment is being carried in the things that I will be saying to you today.

THE CHAIRMAN: Thank you.



APPENDIX D

The Questionnaire





ITEMS FOR CONSIDERATION IN RELATION TO SECOND REPORT

- (1) What was sought to be achieved by establishing the Board of Review process in the Environmental Contaminants Act?
  - (a) Was it to provide the Department (Environment Canada) with an evaluation of a proposed regulation as well as with an impartial assessment of its general policy in dealing with the substance in question? Section 6(1) requires that "the proposed order and regulations or the proposed regulations" be referred to the Board, suggesting that the process is essentially to review the soundness of a proposed regulation to which objection has been made. This is also suggested by the nature and scope of the representations by the Department before this Board, including the reference to us of proposed revisions to the proposed chlorobiphenyl regulations.
  - (b) Was it merely to determine the "nature and extent of the danger posed by the substance" as suggested by Section 6(2)? If so, is the Department not as capable (or more capable) of making such a determination by drawing upon its available expertise or should this be subject to some review process in the public interest?
  - (c) Was it to provide an impartial forum for industry and "public interest" groups to make representations so that the Minister could not be accused of being insensitive to these representations (unless he were to act contrary to the recommendations in the report of a Board)?
  - (d) Are all of the above implicit in the Act? Are there other possible objectives?
- (2) Quite apart from the original purpose in establishing the Board of Review process, what scope of review would be most beneficial to the public interest, having in mind the objective of controlling or eliminating toxic elements?
- (3) What procedure should be adopted to deal with last-minute changes in proposed regulations which have already been referred to a Board of Inquiry, such as the following:

- 2 -

- (a) Proposals by witnesses at public hearings regarded as acceptable by the Board?
- (b) Proposals by the Board, itself, in consequence of the hearings?
- (c) Proposals by the Government in consequence of the hearing?

(Note - The interest here is in avoiding the need for repetitious public hearings without diminishing the right to be heard in relation to both material and non-material proposed changes.)

- (4) (a) What is a valid "notice of objection" under Section 5(3) of the Act?
- (b) What procedure does the Department have for making a determination as to whether or not a "notice of objection" is valid under the Act and, if a formal procedure does not exist, what procedures should be established?
- (c) What criteria and procedures might be established to determine the preliminary issues of whether the objection is "frivolous" or, generally, what should be regarded as a valid notice of objection?
  - (i) Would it undermine public confidence in the impartiality of the process if this were done internally by the Department?
  - (ii) Would an appeal to an appropriate body eliminate such concerns?
  - (iii) Should a Board be constituted in every case where there is a purported notice of objection, leaving it to the Board to decide upon the validity of the notice of objection before proceeding?
- (d) What is the significance of the condition in Section 5(3) that an objector must be a person "having an interest therein"? Pecuniary? Other? What is appropriate?
- (e) (i) Should procedures be established for the withdrawal of a notice of objection and should limits or penalties be imposed in relation to withdrawals?
- (ii) Assuming that preliminary criteria of "interest" and substance (i.e. not "frivolous") have been met, should the withdrawal

of all notices of objection result automatically in the termination of an inquiry without any substantial report? On the other hand, if a basis for a substantial objection does exist in fact, what is the relevance of the withdrawal of a notice of objection?

(iii) Is there a sound reason in public policy for a Board to be established in every case where important areas of toxics and contaminants are involved, whether a valid notice of objection has been filed or not? How could this be limited to important areas?

(5) Given the language of Section 3(4), how do you conceive the role of joint advisory committees and how might the work of such committees relate to that of Boards of Review?

(6) What procedures should be followed by a Board in the course of its inquiry considering its powers, which correspond to those of a Commissioner under The Inquiries Act?

(a) Should a Board take initiatives in acquiring evidence by taking an "inquisitorial" approach and, for example, commission scientific studies and/or experiments in some cases, seek out its own expert witnesses and retain its own counsel?

(b) Or should it play a more passive role, simply receiving whatever evidence and representations might be presented?

(c) Where there are parties with opposing viewpoints, should a strict adversarial approach be adopted at public hearings with restrictions as to "standing," opportunities for cross-examination by the parties, etc.?

(d) Should all evidence be received at public hearings and be made available to interested parties and should there always be a formal transcript of the proceedings? Or is not a format of informal bilateral interview with interested parties or government desirable?

- (e) What form of notice of the Board's inquiry and of any public hearings, would be appropriate?
  - (f) Should funds be made available for "public interest" representation through payment of expenses, in part, or otherwise?
  - (g) Should records be kept of the executive sessions (when the Board sits in private) of a Board?
  - (h) How broadly should the concept of "interested or knowledgeable person" in Section 6(2) be interpreted?
- (7) (a) Who should be appointed as members of Boards of Review i.e. what type of expertise, experience and stature are appropriate for each of the Board members? What combination of backgrounds is desirable on a particular Board?
- (b) Should some form of "conflict of interest" guidelines be established or adopted for Board members?
- (c) Should some form of consultative process (formal? informal?) be established to advise the Minister in relation to specific appointments or in establishing a "panel" from which to draw?
- (8) What administrative machinery should be established to provide financial and administrative support for Boards of Inquiry? Would the perceived impartiality of Boards be affected if such funding or services were provided through existing Departmental resources? Is it possible to devise logistical arrangements from Departmental resources that are perceived as independent and are so in fact, which will service approximately two to four Boards per year?

APPENDIX E

Mailing List for the Questionnaire





MAILING LIST FOR THE QUESTIONNAIRE

Adhesives and Sealants Manufacturers  
Association of Canada  
55 York Street, Suite 512  
Toronto, Ontario  
M5J 1S2

B.C. Hydro and Power Authority  
Operation Engineering Division  
15th Floor, - 970 Burrard Street  
Vancouver, British Columbia  
V6Z 1Y3

Mr. Eric Bergenstein  
Box 224  
Fonthill, Ontario  
L0S 1E0

British Columbia Wildlife  
Federation  
17655 - 57th Avenue  
Surrey, British Columbia  
V3S 1H1

Mr. H.R. Butler, P. Eng.,  
Supervisor  
Environmental Control  
Inco Metals Company  
Copper Cliff, Ontario  
POM 1N0

Canadian Agricultural Chemicals  
Association  
116 Albert Street  
Suite 710  
Ottawa, Ontario  
K1P 5G3

Canadian Arctic Resources Committee  
11-46 Elgin Street  
Ottawa, Ontario  
K1P 5K6

Canadian Bar Association  
Environmental Law Section  
c/o West Coast Transmission Co.Ltd.  
1333 West Georgia Street  
Vancouver, British Columbia  
V6E 3K9

Canadian Chamber of Commerce  
Suite 710  
1080 Beaver Hall Hill  
Montreal, Quebec  
H2Z 1T2

The Canadian Chemical Producers'  
Association  
Suite 805  
350 Sparks Street  
Ottawa, Ontario  
K1R 7S8

Canadian Environmental Law Association  
8 York Street  
5th Floor South  
Toronto, Ontario  
M5J 1R2

Canadian Fertilizer Institute  
350 Sparks Street  
Suite 602  
Ottawa, Ontario  
K1R 7S8

Canadian Importers Association Inc.  
World Trade Centre  
60 Harbour Street  
Toronto, Ontario  
M5J 1B7

Canadian Labour Congress  
2841 Riverside Drive  
Ottawa, Ontario

Canadian Lumbermen's Association  
Timber House  
27 Goulburn Avenue  
Ottawa, Ontario  
K1N 8L7

Canadian Manufacturers Association  
1 Yonge Street  
Toronto, Ontario  
M5E 1J9

Canadian Nature Federation  
Suite 203  
75 Albert Street  
Ottawa, Ontario  
K1P 6G1

Canadian Paint Manufacturers  
Association  
2050 Mansfield, Suite 800  
Montreal, Quebec  
H3A 1Y9

Canadian Paperworkers Union  
Suite 1501  
155 Sherbrooke Street West  
Montreal, Quebec  
H3A 2N3

Canadian Petroleum Association  
Suite 400  
130 Albert Street  
Ottawa, Ontario  
K1P 5G4

Canadian Pulp and Paper Association  
2300 Sun Life Building  
Montreal, Quebec  
H3B 2X9

Canadian Wildlife Federation  
1673 Carling Avenue  
Ottawa, Ontario  
K1P 1C4

Chemical Institute of Canada  
Room 906  
151 Slater Street  
Ottawa, Ontario  
K1P 5H3

Conseil Québécois de  
l'environnement  
C.P. 91  
Sillery(Québec)  
G1T 2P7

Conservation Council of  
New Brunswick  
P.O. Box 541  
Fredericton, New Brunswick  
E3B 5A3

Consumers Association of Canada  
251 Laurier Avenue West  
Suite 801  
Ottawa, Ontario  
K1P 5Z7

Consumers Glass Company Limited  
777 Kipling Avenue  
Toronto, Ontario  
M8Z 5G5

Council of Forest Industries  
of British Columbia  
1500/1055 West Hastings Street  
Vancouver, British Columbia  
V6E 2H1

Mr. E. Czerkowski  
Director of Electrical and  
Mechanical Engineering  
M.M. Dillon Limited  
Box 426  
London, Ontario  
N6A 4W7

Dominion Foundries and Steel, Limited  
P.O. Box 460  
Hamilton, Ontario  
L8N 3J5

Du Pont Canada Inc.  
Research Centre  
Box 5000  
Kingston, Ontario

Ecology Action Centre  
Forrest Building  
Dalhousie University  
Halifax, Nova Scotia  
B3H 3J5

Electrical and Electronic Manufacturers  
Association of Canada  
Ottawa Office  
77 Metcalfe Street, Suite 809  
Ottawa, Ontario  
K1P 5L6

The Engineering Institute of Canada  
Suite 700  
2050 Mansfield Street  
Montreal, Quebec  
H3A 1Y9

Eurocan Pulp and Paper Co. Ltd.  
535 Thurlow Street  
Vancouver, British Columbia  
V6E 3L5

Fisheries Council of Canada  
77 Metcalfe Street  
Suite 603  
Ottawa, Ontario  
K1P 5L6

Friends of the Earth  
5th Floor  
53 Queen Street  
Ottawa, Ontario

Grocery Products Manufacturers  
of Canada  
Suite 703  
170 Laurier Avenue West  
Ottawa, Ontario  
K1P 5V5

Institute for Environmental  
Studies  
University of Toronto  
Toronto, Ontario  
M5S 1A4

Institute for Resource and  
Environmental Studies  
Dalhousie University  
6086 University Avenue  
Halifax, Nova Scotia  
B3H 1W7

Iron Ore Company of Canada  
P.O. Box 1000  
Labrador City, Newfoundland  
A2V 2L8

The Mining Association of Canada  
Suite 705  
350 Sparks Street  
Ottawa, Ontario  
K1R 7S8

Natural History Society of  
Prince Edward Island  
53 Fitzroy Street  
Charlottetown, P.E.I.  
C1A 1R4

National Indian Brotherhood  
1st Floor, Bankal Building  
102 Bank Street  
Ottawa, Ontario  
K1P 5N4

National and Provincial Parks  
Association of Canada - Edmonton  
Chapter  
13715 - 101 Avenue  
Edmonton, Alberta  
T5N 0J8

Newfoundland and Labrador Hydro  
St. John's, Newfoundland  
A1A 2X8

Newfoundland Natural History Society  
c/o Biology Department  
Memorial University  
Saint John's, Newfoundland  
A1C 5S7

Nordfibre Company  
Box 3100  
North Bay, Ontario  
P1B 8K7

Ontario Hydro  
Production and Transmission  
700 University Avenue  
Toronto, Ontario  
M4G 1X6

Ontario Mining Association  
199 Bay Street  
Toronto, Ontario

Professor R. Paehlke  
Trent University  
Peterborough, Ontario

Pollution Probe  
54-53 Queen Street  
Ottawa, Ontario

Public Interest Advocacy Centre  
44-53 Queen Street  
Ottawa, Ontario

The Rubber Association of Canada  
100 University Avenue  
Suite 1100  
Toronto, Ontario  
M5J 1V6

Saskatoon Environmental Society  
P.O. Box 1372  
Saskatoon, Saskatchewan  
S7K 3E5

The Science Council of Canada  
Berger Building  
100 Metcalfe Street  
Ottawa, Ontario  
K1P 5M1

Sierra Club of Western Canada -  
Alberta Group  
P.O. Box 341 - Station G  
Calgary, Alberta  
T3A 2G3

Sierra Club of Western Canada -  
Winnipeg Group  
501 University Crescent  
Fort Garry, Manitoba  
R3T 2N6

Sierra Club of Western Canada -  
Victoria Group  
1645 Broadmead Avenue  
Victoria, British Columbia  
V8P 2V2

The Soap and Detergent Association  
of Canada  
Suite 101  
1185 Eglinton Avenue East  
Don Mills, Ontario  
M3C 3C6

La Société pour vaincre la  
pollution  
445, rue Saint-François Xavier  
Montréal (Québec)  
H2Y 2T1

Society to Overcome Pollution  
1361 Greene Avenue  
Montreal (Quebec)  
H3Z 2A5

Society of the Plastics Industry  
of Canada  
Suite 104  
1262 Don Mills Road  
Don Mills, Ontario  
M3B 2W7

South Okanagan Environmental Coalition  
Box 188  
Penticton, British Columbia  
V2A 6K3

Voice of Women  
175 Carlton Street  
Toronto, Ontario  
M5A 2K3

Yukon Conservation Society  
P.O. Box 4163  
Whitehorse, Yukon  
Y1A 3S9



APPENDIX FA. Replies to the Questionnaire Quoted in the Text

- F-1 Pollution Probe - Ottawa
- F-2 The Public Interest Advocacy Centre
- F-3 British Columbia Hydro and Power Authority
- F-4 The Canadian Manufacturers' Association
- F-5 Ontario Hydro
- F-6 Eurocan Pulp and Paper Co. Ltd
- F-7 Dalhousie Law School on Behalf of the Institute of Resources and Environmental Studies
- F-8 Mr. E. Czerkawski, M.M. Dillon Limited, London, Ontario
- F-9 Ontario Mining Association

B. Replies to the Questionnaire not Quoted in the Text

- F-10 Mr. H.R. Butler, Supervisor, Environmental Control, Inco Metals Company, Copper Cliff, Ontario
- F-11 Canadian Environmental Law Association
- F-12 Canadian Lumbermen's Association
- F-13 Canadian Paperworkers Union
- F-14 Canadian Pulp and Paper Association
- F-15 Council of Forest Industries of British Columbia
- F-16 Friends of the Earth
- F-17 The Mining Association of Canada
- F-18 Nordfibre Company
- F-19 Professor Robert C. Paehlke, Trent University, Peterborough, Ontario
- F-20 The Sierra Club of Western Canada - Victoria Group





# **pollution probe-ottawa** **enquête pollution d'ottawa**

53 queen st., ottawa K1P 5C5 (613) 231-2742

March 27, 1980

Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th Floor, Place Vincent Massey  
351 St. Joseph Blvd.  
Ottawa, Ontario  
K1A 1C8

To	Dr. Hazen Thompson
ENVIRONMENTAL CONTAMINANTS CONTROL BRANCH	
DATE: 30-04-80	
File Number	440.2-73/P15 2e

Dear Dr. Thompson,

03063

Thank you for giving us this opportunity to express our views on the questions attached to the letter from Mr. Maxwell Cohen, Chairman, P.C.B. Board of Review, dated March 5, 1980.

In preparing this answer to the questionnaire we had the assistance of Charles S. Alexander who was a legal advisor to the Department of the Environment at the time the Environmental Contaminants Act was introduced and passed by Parliament.

Yours sincerely,

George Pacaud  
Vice-Chairman, Pollution Probe,  
ottawa.



# **pollution probe-ottawa**

## **enquête pollution d'ottawa**

**53 queen st., ottawa K1P 5C5 (613) 231-2742**

Pollution Probe's Reply to the Questionnaire of Mr. Maxwell Cohen,  
Chairman, P.C.B. Board of Review, dated March 5, 1980.

Before addressing the questions in turn, we wish to make some general comments about the Environmental Contaminents Act in order to provide a setting in which to consider the role that Parliament intended should be played by a Board of Review.

The Environmental Contaminents Act can be used to control the dangerous entry of substances to the environment. (A substance does not necessarily have to be toxic to present a danger. A non-toxic substance may also present a danger by reason of the manner of its entry). Without denigrating the Act as a means of imposing controls, its primary objective is to establish a procedure by which problems can be identified and dealt with, through voluntary or other action, before they reach the point where controls must be imposed under the Act to prevent a significant danger to human health or the environment. That this is so appears from the progression contemplated by the provisions of the Act. Thus, Section 3 is concerned with the gathering of information where it is "suspected" there is a problem. Section 4 is concerned with compulsory disclosure of information where there is "reason to believe" a problem exists. Subsection 5(1) requires the two responsible ministers to consult with, amongst others, provincial officials, to determine if the danger of which they "are satisfied" will be eliminated by action taken under some other law. Finally - except in cases of emergency, for which subsection 7(3) provides - the ministers are required by subsection 5(2) to publish what action they propose before they are free to ask the Governor in Council to enact a regulation to implement their proposal. In the normal way, therefore, it can reasonably be expected that a problem will have received careful study before any regulations under the Environmental Contaminents Act are proposed. In this context, the role of the Board of Review is to advise the ministers whether they have correctly perceived a significant danger to human health or the environment and, if so, whether the measures they have proposed to deal with it are adequate or inadequate to remove that significant danger.

Turning to the questions we wish to say::

1. A Board of Review is required to understand the nature and extent of the danger posed and, if it concludes the danger is significant, to advise the two ministers responsible whether the measures they have proposed to deal with it are adequate or inadequate. (If Parliament had believed that all wisdom and all knowledge in such matters resided in the Department, it would not have made provision for the constitution of Boards of Review.)





# pollution probe-ottawa enquête pollution d'ottawa

53 queen st., ottawa K1P 5C5 (613) 231-2742

## Page 2.

2. It is in the public interest that a Board of Review do whatever it believes is required in a given case to become informed (so that it can properly advise the ministers) without unnecessarily wasting the taxpayer's money.

3. If a Board of Review recommends a change (material or non-material) in a proposed regulation and the ministers decide to accept it, surely Parliament cannot be said to have intended in such case that there must be a revised publication of the proposal (with the possibility of a second Board of Review inquiry) before the ministers can ask the Governor in Council to act. Parliament cannot reasonably be said to have intended to create such an absurd circus, wholly wasteful of public funds.

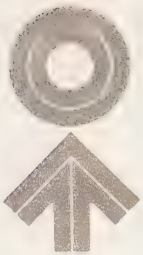
4.(a) It is not sufficient to the validity of a notice of objection for it to say you are doing too much or not enough. The objection must (1) either attack the validity of the perception that a significant danger exists or (2) attack the measures proposed as inadequate or unwarranted to deal with the significant danger and (3) state the reasons why in either case.

4 (b) and (c). Can procedures and criteria be advantageously established to determine what constitutes a valid notice of objection? Public confidence in impartiality might be better assured if this preliminary issue was decided by an independent third person, but surely it would be wasteful of the taxpayer's money to constitute a Board of Review to decide the validity.

4.(d) The significance of the reference to a person "having an interest therein" in subsection 5(3) will be apparent if it is contrasted with the reference to "any other interested or knowledgeable person" in subsection 6(2). Only a person having a pecuniary or other interest greater than that of the general citizen can, by notice of objection, trigger the establishment of a Board of Review. (Considerations respecting the taxpayers money come into play here); but once the Board of Review is established, knowledgeable persons should be encouraged to appear to assist the Board to fulfill its statutory duty to become informed so it can properly advise.

4 (e) (i) and (ii). These questions cannot advantageously be answered in the abstract. If a Board of Review is established it must be because a (valid) notice of objection is made by an interested person who could not be persuaded that his objection was unwarranted. That he withdraws it later does not necessarily mean there is nothing for the Board to do, unless the objection was frivolous, in which case the Board should not have been established.





# **pollution probe-ottawa**

## **enquête pollution d'ottawa**

**53 queen st., ottawa K1P 5C5 (613) 231-2742**

Page 3.

4.(e) (iii). Surely not.

5. The role of advisory committees is to help the ministers in the information gathering stage under section 3. No controls (regulations) under the Environmental Contaminants Act are in contemplation at this stage. (Those who served on such committees might have useful things to say to a Board of Review.)

6. These questions cannot advantageously be answered in the abstract. For example, if a Board of Review is satisfied that it is fully informed after receiving whatever evidence and representations are made, it would be wasting the taxpayers money to commission further studies. Moreover, the adversarial approach whilst satisfactory to test allegations of fact is not necessarily satisfactory to test opinion and supposition. Surely the form of notice will be chosen to accord with the nature of the inquiry and the perceived need to attract representations by knowledgeable persons.

7. The diverse nature of the problems which Boards of Review may be required to consider under the Environmental Contaminants Act make it very difficult to approach the problem of membership except on an ad hoc basis. If a great many Boards have to be established it will mean that the Act has failed to achieve its primary objective namely to obviate the necessity of having to resort to the imposition of controls under the Act.

8. Boards of Review are purely advisory under the Act (unlike for example the National Energy Board which makes decisions). Their perceived impartiality will depend upon the selection of the membership.

# The Public Interest Advocacy Centre

April 14, 1980

# Le Centre pour la défense de l'intérêt public

To	Mr. J. J. Schults
ENVIRONMENTAL CONTAMINANTS CONTROL BRANCH	
DATE	

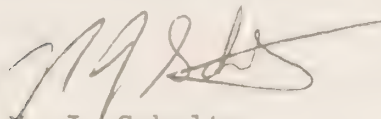
Dr. Hazen Thompson,  
Executive Secretary,  
P.C.B. Board of Review,  
Environment Canada,  
14th Floor Place,  
Vincent Massey,  
351 St-Joseph Blvd.,  
Hull, Quebec.  
K1A 1C8

Dear Sir:

I acknowledge receipt of and thank you for the questionnaire with respect to the Environmental Contaminants Board of Review process. Our response is enclosed.

We hope that our comments will be of assistance to you and should be pleased to comment further if required.

Yours very truly,



M. J. Schults  
Associate General Counsel

njs.jf

53 Queen Street  
Suite 44  
Ottawa, Ontario K1P 5C5  
(613) 563-0734

53, rue Queen  
Pièce 44  
Ottawa (Ontario) K1P 5C5  
(613) 563-0734

COMMENTS OF THE PUBLIC INTEREST ADVOCACY  
CENTRE WITH RESPECT TO THE BOARD OF  
REVIEW PROCESS IN THE ENVIRONMENTAL  
CONTAMINANTS ACT IN RESPONSE TO QUESTIONNAIRE  
DATED MARCH 5, 1980

MARCH 31, 1980

N. J. Schultz  
Associate General Counsel  
The Public Interest Advocacy Centre  
53 Queen Street, Suite 44  
Ottawa, Ontario  
K1P 5C5

COMMENTS WITH RESPECT TO THE  
BOARD OF REVIEW PROCESS IN THE  
ENVIRONMENTAL CONTAMINANTS ACT

1.

What was sought to be achieved by establishing the Board of Review Process in the Environmental Contaminants Act?

The sole legal function of an Environmental Contaminants Board of Review is to provide an impartial forum for "any person having an interest" in a proposed order or regulation (section 5 (3)). The question of who can legitimately claim to have an interest depends entirely on the nature of the proposed order or regulation.

The Board of Review is then required to ask itself the same question which the Minister of the Environment and the Minister of National Health and Welfare were required to ask themselves prior to proposing the order or regulation. That is, the Board must ask itself - what is the nature and extent of the danger posed by the substance? As such, the Board's report will provide the Department with an objective evaluation of the proposed order or regulation. Since the Board reports to the Ministers and the final decision with respect to the order or regulation remains their's, this is an important practical aspect of the process.

The Board of Review process does not call into question the competence of the Department to determine the nature and extent of the danger posed by the substance. The concept of "danger", whether it be a danger posed by PCBs or a danger posed by radioactive emissions from a nuclear power plant, has always been, in Canada, a relative one. Reasonable people may - and often do - disagree on the point at which the hazards associated with the use of a substance exceed the benefits. All human activities are only relatively safe or, to put it another way, relatively dangerous. The Board of Review process provides an opportunity for the orderly expression of differences of viewpoint with respect to the relative safety of a substance.

It must also be recognized that the study of environmental contamination is developing rapidly. So too, for that matter, is the methodology of cost/benefit analysis. There is still room for disagreement within the scientific community on many relevant matters. The Board of Review process ensures that anyone who may be affected by a proposed order or regulation is given an opportunity to present whatever evidence he may have which tends to challenge the position of the Department.

All of this is a matter of simple fairness. The process ensures that any dissenting opinions are heard before an order or regulation is finalized.

2. What scope of review would be most beneficial to the public interest?

The use of the word "review" here in a sense begs the question. The word implies that someone has decided, albeit in a preliminary fashion, to do something. Given that, there will be at least one person with a stake in the outcome of the review - the person who has made the decision. With a clearly defined proponent, the appearance of an opponent is inevitable. That brings us back to the existing purpose of the Board of Review. A potentially broader process is available in the advisory committees established pursuant to section 3 (4) of the Act. More is said of these committees in response to question 5.

3. What procedure should be adopted to deal with last-minute changes in proposed regulations which have already been referred to a Board of Review?

This is a question which will likely be answered in any case by way of judicial review. As I read the Act, however, the question is not difficult.

The Governor in Council must act under section 7 on the recommendation of the Ministers. He can only act if there has been publication of the Minister's intention to make a recommenda-



tion to the Governor in Council and if any consequent Board of Review has-reported. If the action taken by the Governor in Council under section 7 differs from the action proposed by the Ministers as published under section 5, then the necessary condition precedent of the Governor's action has not been fulfilled. That is, the Governor is acting on a recommendation which has not been published pursuant to section 5. A proposed recommendation has, of course, been published under section 5 but it is not the recommendation which the Ministers are now placing before the Governor.

To make a long story short, if for any reason the Ministers choose to alter their recommendation after publication, the entire process must be started again. Since there are emergency provisions in the Act, the only cost will be additional administrative expense. While there would seem to be no way to avoid the second publication and waiting the 60 day period prescribed by section 5 (3), it would be possible to speed up or avoid the Board of Review process. This could be accomplished either by negotiation among the parties or by the Board adopting the evidence of the previous Board for the purpose of the new proceeding. The National Energy Board Rules of Procedure contain just such a provision.

4. What is a valid "notice of objection" under section 5 (3) of the Act?

A valid notice of objection is any piece of paper submitted by any person which says simply that that person objects to the Ministers' proposal. The only condition precedent is that the person have an interest in the proposed order or regulation. As a result, the notice should disclose the nature of that interest. If the notice does not do this, it is impossible to ascertain that the notice has been given by someone with an interest, i.e., is a valid notice.

Since the process is triggered by the Minister receiving a notice of objection from an interested person, only he can decide whether his daily mail contains such a notice. If he decides that a certain piece of paper is not a valid notice, the purported objector has a remedy under section 18 of the Federal Court Act. In coming to his decision the Minister is not obligated to adopt any procedures and it would seem an unnecessary complication to adopt formal procedures.

The only condition precedent to filing a notice of objection prescribed by statute is that one have an interest. There is no requirement that the objection not be frivolous. The interested person need only state that he objects to the proposal and that gives him a right to a hearing whether his objection is "frivolous" or not. It is for the Board to determine the merit of the objection.

Once a notice of objection has been filed by an interested person and a Board of Review established, the Board has no jurisdiction to question the Ministers' decision to establish the Board. If the Minister established the Board without having received a valid notice of objection then a remedy might lie under section 18 of the Federal Court Act but this remedy could not be pursued by the Board itself.

The question of who may have an interest depends entirely on the nature of the proposed order or regulation. It is clear that the Act contemplates substances which may be harmful to human health as well as the environment. Those whose health may be adversely affected may well have a valid interest along with those whose property or business might be affected. The

National Energy Board and the CRTC, for example, recognize interests which are not pecuniary in nature and their decision to do so has been upheld by the courts. As a practical matter, if publication is limited to the Canada Gazette then the Minister can be assured that only those with a pecuniary interest will become aware of the publication and so be in a position to object. The Minister should, out of fairness, adopt a practice of publishing the proposal in local newspapers as well as the Canada Gazette.

Once a Board of Review has been established, it is difficult to see how the initiating notice of objection could be withdrawn. This is because section 6 (2) seems to give rights to people who may not have had rights before the establishment of the Board. That section provides that the person filing the notice of objection "and any other interested or knowledgeable person" shall be given a reasonable opportunity of appearing before the Board. Withdrawing the notice of objection would deprive these other interested or knowledgeable persons of their right to appear before the Board. It would seem that the only way of resolving this difficulty is simply to convene the hearing, receive a statement from the initial objectors that they are tendering no evidence and are withdrawing the objection, inquire if there is anyone else present who wishes to give evidence or make submissions, and, if not, close the hearing.

A more interesting question is whether closing the hearing under such circumstances would also result in closing the inquiry. It would seem that on a plain reading of section 6 (2), the hearing may only be one aspect of the process. The Board is charged to inquire into certain matters and as part of that inquiry to hear certain people. It would seem that once the Board is established, it must engage in an inquiry whether or not there are any parties who wish to be heard. In those circumstances, the inquiry could be quite brief.

There would seem to be no jurisdiction for establishing a Board in every case where important areas of toxics and contaminants are involved whether a valid notice of objection has been filed or not. The Act requires the filing of a notice of objection to trigger the Board of Review process. This would not, of course, inhibit the establishment of a Board of inquiry under The Inquiries Act. That, however, is a matter largely outside the control of the Minister. The use of advisory committees would seem to be the most desirable way of involving the public in the decision making process related to toxics and contaminants.

5. How do you conceive the role of joint advisory committees?

Advisory committees established under section 3 (4) might well provide the most useful forum for public and industry involvement in the decision making process.

To begin with, because the process is advisory and not adversarial, there is considerable flexibility as to who the committee may hear and the manner in which the proceedings may be conducted. It is interesting to note that section 3 (4) only requires members of the public to demonstrate a concern which would seem to be something less than an interest. Providing the procedures adopted result in the presentation of a significant range of concerns and interests, the committee should be in an excellent position to define issues, identify areas of conflict, and so to advise the ministers.

In establishing its procedures, the committee must decide whether to be simply a forum for receiving representations - which often amounts to blowing off steam - or whether to be a forum which also permits parties to test other parties' representations. In other words, whether some form of cross-examination should be permitted. The difficulty with this choice is that cross-examination tends to promote tension which may detract from the committee's work. On the other hand, however, if representations are not tested, it may be thought that the committee is being "snowed". The public,



in particular, may feel that the industry, with its high-powered presentations, is giving the committee a snow job. This too can create tension which detracts from the committee's work.

A compromise between formal cross-examination and no testing of parties' views might be some sort of a round-table or work-shop procedure. To work effectively, this process requires participants to know each other's initial position beforehand. Its advantage is that it permits a less formal question and answer exchange. An example can be found in the committee which the CRTC has established to review, on an annual basis, Bell Canada's construction budget.

Whatever procedure is adopted, it would seem that the committee will be required to take one very important initiating step. That involves the dissemination of useful information to interested or concerned parties. This information will be essential if parties are to participate effectively and to make useful representations to the committee. The provision of this information may also serve a useful educational function. The involvement of the Department as an information source would seem to be particularly important here.

Whatever the relationship of advisory committees to Boards of Review, it seems clear that care should be taken that the same individuals do not sit as both committee members and Board members with respect to the same subject matter. Since the advice of the committees may lead to the Ministers proposing some order or regulation and that order or regulation could become the subject matter of Board of Review proceedings, Board members may find themselves in review of their own advice. It would, of course, be useful for a Board of Review to have before it the report of any advisory committee which may have been established prior to the decision to propose the order or regulation under review. That would seem to be the only tie-in between committees and Boards of Review.



One final comment with respect to advisory committees relates to the information which can be obtained under section 4 (1). Advisory committees are charged to review data collected pursuant to sections 3 (1) and 3 (3)a. There is no reference to section 4 (1). Section 4 (1) relates to information obtained from the industry relating to the industry's knowledge of the substance. In addition the Minister under that subsection is entitled to require the industry to undertake tests and provide the Minister with the results. It seems clear that this information would be useful to both committees as well as Boards of Review. It is suggested that section 3 (3)a be construed so that once information is received by the Minister under section 4 (1) it would become "data" for the purposes of section 3 (3)a. Since section 6 (2) does not include a reference to section 4 (1), Boards of Review may also have this problem.

6. What procedures should be followed by a Board?

It would seem neither necessary nor desirable for a Board to take an inquisitorial approach, notwithstanding the application of The Inquiries Act. The Board's role is to provide a forum for those who wish to challenge the Minister's proposal. Presumably the Minister through his Departmental staff has done background work which supports the proposal. This, of course, should be presented to the Board. No doubt there may be some dispute as to whether the Departmental material should simply be filed with the Board or presented by a witness from the Department who would then be available for cross-examination. I would argue that the latter is preferable. The material filed by the Department may require explanation or may involve assumptions and methodologies which have limitations or weaknesses which can be brought out on cross-examination.

Once the Departmental evidence has been presented to the Inquiry, the onus of coming forward with evidence to chal-

lenge the Department would then fall on those challenging the proposal. If no such evidence was forthcoming and the Department's evidence had withstood cross-examination then it would seem that the Board would be obliged to affirm the proposal.

It is fairly typical for Commissions established under The Inquiries Act to conduct the inquiry by issuing a general invitation for interested parties to come forward and make representations or present evidence. It is also common practise for such Commissions to issue special invitations to individuals or organizations which the Commission believes to have some particular interest in the proceeding or information which might assist the Commission. It is also standard practise for Commissions to have their own counsel to examine witnesses with respect to matters which may be of particular interest to the Commission or to assist the Commission on matters of law. Apart from that, the procedures of such Commissions are relatively passive in much the same way as those of a judge. It would seem to go well beyond our accepted notions of impartiality for a Board or Commission to undertake studies or experiments on its own behalf. It would not offend our notions of fairness for a Board or Commission to make funds available to certain groups to enable those groups to hire experts to study the matter and present their point of view before the Board or Commission. The groups typically funded are public interest groups which lack the resources to present their point of view affectively. Funding is intended to prevent well-financed parties (eg. industry groups) from winning by default. There are a number of examples of such funding beginning with the Berger Royal Commission.

The statutory mandate of Boards of Review appears to dictate quite a formal procedure. Section 6 (2) specifically refers to the presentation of evidence and this typically involves cross-examination. In any event, it is generally considered that cross-examination does assist a Board in assessing the evidence

presented to it. The threat of cross-examination also tends to make parties more mindful of what they are saying. So far as standing is concerned, the process can only be initiated by a person with the requisite interest. This, of itself, brings into play the jurisprudence with respect to standing. Once the process has been initiated, however, the Board need not enforce the requirements of standing quite so strictly. Section 6 (2) requires the Board to hear from other "knowledgeable" persons as well as other "interested" persons. It seems then that even though one may not have the requisite interest within the meaning of the jurisprudence, one is still entitled to appear before the Board if one is "knowledgeable" in the opinion of the Board. This would seem to vest a wide discretion in the Board in deciding who may appear before it. It is suggested that that discretion should be exercised generously in the sure knowledge that the courts will not interfere with the discretion. I would argue, for example, that the ordinary observations of people living along a stream would make them "knowledgeable" as much as specialized observations of a scientist who had done tests in relation to the stream. There is support for this view in those cases where damages have been recovered for an interference with rights caused by pollution where the only evidence of substance was that of individuals with no specialized training. Indeed, it has sometimes happened that the opinions of scientists have been rejected in favour of conclusions based upon the observations of untrained persons.

Since the Board must present its report together with its recommendations and "all evidence that was before the Board" to the Ministers pursuant to section 6 (4), it would seem that a transcript of all the evidence would be required. Since the hearings are public and a transcript would seem to be required, there would seem to be no reason why interested persons should not be able to obtain (subject to the usual fees) a copy of the transcript.



Once a Board of Review has been established, all Board proceedings (except for the Board's deliberations) should be in public. Any meetings between Board members and parties to the proceedings in private would be entirely inappropriate and contrary to the rules of natural justice. The time for such informal meetings would be at the advisory committee stage since at that point no one's rights are legally threatened.

So far as notice of the Board's hearings is concerned, as noted above, it is notice of the proposal which is most important. If notice of the proposal is not given through the general media, members of the public who may have an interest will not become aware of it. As a result, they will be unable to exercise their right to challenge the proposal if they so choose. Similary notice of the Board's hearings should be given through the general news media. The notice should describe the nature of the hearings, the right of interested and knowledgeable people to appear, and any relevant procedural matters.

The principle impediment to effective public interest representation at hearings is a lack of financial resources. If the right of public interest groups to appear at these hearings is to be more than a merely theoretical right, some form of funding must be considered. One method of providing funding has been through costs awards. The Ontario Energy Board and the CRTC, to name only two, have adopted this method of funding. Unfortunately the Environmental Contaminants Act does not confer a jurisdiction to award costs. The other alternative is to provide funding in advance in a fashion similar to the Berger Inquiry. The question of funding is a substantial one in its own right. Enclosed is an argument submitted recently to the Ontario Energy Board with respect to this question. I might note that the argument was successful and twenty thousand dollars in costs was received. We should be pleased to comment further on this topic should you require it.

7. Who should be appointed as members of Boards of Review?

Given that the function of Boards of Review is to hear objections to Ministerial proposals, impartiality is essential. As noted above, whether the procedures provide for it or not, the tone of the proceedings will be adversarial. It has already been suggested that the procedures should be adversarial. As a result, the Chairman of any Board should be someone experienced in handling an adversarial type proceeding. People with a legal background would be an obvious choice although any one with some experience with such proceedings would be suitable.

Given the technical nature of the subject matter it would also seem desirable that one member of any Board be someone with the relevant technical background. Given the need for impartiality, the academic community would seem to be an obvious source for such people. If one could find people with the requisite appreciation of procedures and the technical background, such people would make excellent chairmen.

Given the substantial community interest in such hearings, it would also seem desirable to have as a Board member an individual whose background might suggest a more general appreciation of social issues. In drawing lists which may be used to select Board members, it might be desirable for the Minister to invite suggestions from both public interest and industry groups. The opportunity for consultation in this regard would also arise if public interest and industry groups were involved in the decision making process prior to the putting forward of a proposal. It is not uncommon, in any event, for interested individuals or groups to make suggestions in this regard.

So far as conflict of interest guidelines are concerned, the jurisprudence with respect to impartiality is sufficient to deal with this problem.



8.

What administrative machinery should be established?

The public, and for that matter the industry, seem only aware of the administrative side of Board proceedings when a Board is very obviously ill-equipped administratively. The vast majority of people will assume that adequate resources have been allocated to a Board to do its job. As a result, it does not, in my view, matter from what source a Board receives its funds. It is the composition of the Board itself which is far more important. It is the Board members who are visible to the public not the Board's purse strings. Since the money will be coming from the Government in one fashion or another, it matters little that it may come directly from the Department. What will cause a blowup is the use of purse strings to restrict or control a Board.

- - - - -

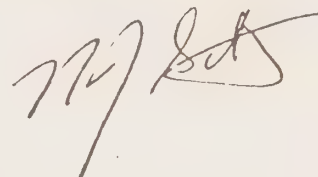
The questionnaire which has elicited these comments covered a very broad range of topics. These comments have attempted to address the areas of interest in a helpful but brief manner. If any of the above comments have been too brief and further comment is required, we should be pleased to comment further.

\* \* \* \* \*

Postscript

Since writing this we have received and read a copy of the PCB Board of Review Report, March 1980. We note that certain of our views differ from those of the Board but that has, with respect, not caused us to alter our opinion. In particular, we would submit that the letter which constitutes Exhibit A-7 of the Report is not sufficient authority for the Minister to make the recommendation contemplated in section 7. It is not the report contemplated by section 6 (4).

If more detailed comments would be of assistance  
we should be happy to oblige.

A handwritten signature in dark ink, appearing to be "M. J. S.", located in the upper right quadrant of the page.



# BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

1265 HOWE STREET  
VANCOUVER, B.C.  
V6Z 2C8  
TELEX 04-54395

File: 296.28

Dr. Hazen Thompson,  
Executive Secretary,  
PCB Board of Review  
Environment Canada,  
14th Floor,  
Place Vincent Massey,  
Ottawa, Ontario,  
K1A 1C8

24 April, 1980

To	Dr. Hazen Thompson
From	
Date	5-25-80
File	
Number	4462 25/4/80

0326

Dear Dr. Thompson:

Re: Boards of Review under the  
Environmental Contaminants Act

Answers to questions listed on pages 2, 3 and 4 of your letter dated 5 March are attached. We appreciated the extra time made available in your letter of 17 March to consider these important questions.

Thank you for giving us the opportunity to comment on the purpose and objectives of Boards of Review established under the Environmental Contaminants Act.

Yours very truly,

CSW/dmg

enclosure

W. D. Gill, P. Eng.  
Division Manager  
Operations Engineering

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

ANSWERS TO QUESTIONS  
FROM  
THE PCB BOARD OF REVIEW  
CONCERNING  
THE ENVIRONMENTAL CONTAMINANTS ACT

Prepared by: A. Grikis, P. Eng.  
Pollution Control Engineer  
Civil & Environmental  
Engineering Department

## Introduction

The following comments on questions raised in the PCB Board of Review's letter dated 5 March 1980 are submitted for your consideration.

An appeal procedure after the issuance of regulations appears to be lacking. Two options have been suggested in answer to Question 4.

-----

## Question 1

Upon review of the Act, the objective in establishing a Board of Review appears to be to obtain an independent assessment of hazards and methods of controlling hazardous substances in the environment.

In order to assess the methods of control, the hazards of the substances under review must be understood. Therefore, the emphasis should not be on independently assessing the hazards, but on understanding the hazards and then doing an independent review of the methods of control, with considerations for economic, social and environmental impact.

Although Section 6(2) of the Act would imply that the Board should determine the "nature and extent of the danger", we would interpret this in the context outlined above, and would accept the expertise of the Department (Environment Canada) on technical aspects.

## Question 2

The most important function of a Board should be to assess whether the timing and scope of a regulation is reasonable with respect to economic, social and environmental considerations.

## Question 3

The intent of this question is not clear. Once a proposed regulation is referred to the Board, and representations are made at public hearings, compromises between objectors and the Department in consequence of the hearings should be documented and implemented: i.e. the Board recommends, the Department implements.

## Question 4

Under the current arrangement, where the Board holds hearings based on objections, the validity of objections must be determined by the Board. It follows then that there must be a permanent Board, appointed for a given calendar duration, rather than to be assembled for particular objections to particular regulations.



- 2 -

The conditions in Section 5(3) of the Act identifying an objector as a person "having an interest" must be very liberally interpreted. It could be a company involved in manufacture objecting to regulations which are too stringent, or it could be a citizen group concerned about health aspects and objecting to regulations not being stringent enough.

The concept of an ad-hoc Board being established to deal with objections to proposed rules is difficult to understand. A preferable arrangement could be as follows:

- establish a permanent Board with members appointed for 2 - 4 years
- give the Board authority to accept or issue regulations
- the Department could then apply to the Board for issuance of regulations
- upon publication of such application, the Board would then be able to hear objections prior to issuing these regulations.

In this scenario, an appeal procedure would have to be established for issued regulations, but such an appeal should not act as a stay of execution.

A better alternative would be for the Department to receive objections to proposed regulations and hold such meetings and hearings as would be considered necessary to resolve these objections. In this option, the Board could be established as an appeal body to consider such aspects as economic, social and environmental impacts of regulations as issued by the Department. The Department would be obliged to comply with the Board's findings and recommendations.

#### Question 5

Advisory committees may be appointed, but it does not necessarily follow that such committees would be appointed. The Department is in a position to carry out technical work and elicit input from various sources concerning control measures.

However, in the overall question of objections to proposed regulations, it may be that advisory committees should propose regulations following investigations. The Department could then entertain objections to such proposals, make necessary amendments and issue regulations, leaving the Review Board free to serve as an appeal avenue to decisions made by the Department.

Question 6

An Inquiry by the Board should be formal, with procedures fairly rigidly laid out. Without such procedures, public hearings can easily get out of hand. The strict adversarial approach may not be advisable during the "objection" stages, but may be useful during hearings of formal appeals to the Board of Review.

The Board should not have to take initiative in acquiring evidence beyond asking questions from the participants, which in all cases should include the Department.

Notice of public hearings should be published in the news media and participants advised by registered letter.

"Public Interest" groups need not be subsidized. If this is the case, then Industry should similarly be subsidized, otherwise a penalty is levied against one section in an inequitable manner. In any case, written submissions should carry as much weight as verbal arguments at a hearing.

Under Section 6(2) of the Act, the words "and any other interested or knowledgeable person" should apply to persons other than the objector who have registered their interest in writing pursuant to a public hearing notice.

Question 7

A Board of Review should represent the public interest in the broadest sense, which is a mix of business, landowner and environmentalist. Experience and stature are of great importance for establishing credibility. Unfortunately "stature" is often associated with established position regarding community or business. Conflict of Interest should be eliminated at the appointment stage.

Question 8

Financial and administrative support of a Board should be independent of the Department. Funds can be made available from General Revenue or a Ministerial Budget for this purpose.

03:65

**The Canadian L'Association  
Manufacturers' des manufacturiers  
Association canadiens**

To	Thompson
ENVIRONMENTAL CONTAMINANTS CONTROL BRANCH	
DATE 24.4.80	
File Number	4402-7817-20

One Yonge Street, Toronto, Ontario M5E 1J9  
Telephone: (416) 363-7261

April 18, 1980

Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th Floor, Place Vincent Massey  
351 St. Joseph Blvd.  
Ottawa, Ontario  
K1A 1C8

Dear Dr. Thompson:

Attached is a response by The Canadian Manufacturers' Association to the questionnaire Mr. Maxwell Cohen, Chairman, PCB Board of Review, forwarded concerning the role of Boards of Review under the Environmental Contaminants Act.

I would like to highlight one concern that arose in answering most of the questions. In our view the Boards of Review under this Act have a very restrictive role, namely to give someone who objects to a proposed regulation a chance to obtain a second opinion as to whether the substance in question is an environmental contaminant that should be regulated under the Environmental Contaminants Act. In making a final decision the Minister of the Environment and the Minister of Health and Welfare would then consider that opinion along with the opinion of their department officials that had led them to developing the proposed regulation.

Essentially the Board investigation is to determine whether the Environmental Contaminants Act should be applied to regulate the substance in question. This is contrary to what the questionnaire suggests; namely that the role of the Board should extend to commenting on the regulation the Minister has proposed and to recommending how the substance should be controlled in the public interest. Developing the regulations is the job of the Minister. The Government's commitment to using the Socio-Economic Impact Assessment process in developing regulations should help to ensure regulations are in the public interest, and the Board of Review does not need to concern itself with this.

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- 2 -

Therefore the role of the Board should be to examine whether the substance should be regulated under the Act and the Board should not be authorized to inquire into the efficacy of the proposed regulation. This is more fully described in our attached response.

Yours truly,

A handwritten signature in cursive script, appearing to read "Gordon Lloyd".

Gordon Lloyd, Manager  
Technical Department

GL/jd

Enclosure

cc: Dr. J.E. Brydon  
Director, Contaminants Control Branch  
Environment Canada

Response by  
The Canadian Manufacturers' Association  
To  
Questionnaire  
On  
Boards of Review  
Established Under  
The Environmental Contaminants Act

April 18, 1980



Question 1

It is our understanding from participation in the Parliamentary hearings and from discussions with officials of Environment Canada that preceded enactment of the Environmental Contaminants Act, that the Act was intended to provide for the control of environmental contaminants that pose a significant danger to human health or the environment and which are not amenable to control under other legislation. Subparagraphs 3(3)(a)(i) to (v) set out criteria to be used in determining whether a substance is indeed an environmental contaminant so as to perhaps warrant control under this Act.

In our view, provisions for a Board of Review were established under the Act to enable anyone affected by a regulation proposed under the Environmental Contaminants Act to object that the substance the regulation aimed to control was not actually a contaminant, as described in the Act, and therefore should not be controlled by the Act. Consequently, section 6(2) requires the Board to "inquire into the nature and extent of the danger posed by the substance or class of substance to which any proposed order and regulation or proposed regulation" would apply. In making this restricted inquiry, the Board is specifically referred to the criteria in subparagraphs 3(3)(a)(i) to (v) to determine if the substance is an environmental contaminant.

As the questionnaire suggests, Environment Canada is as capable as the Board of making such a determination. But the Act enables a

- 2 -

party who disagrees with Environment Canada's assessment that a substance should be regulated as an environmental contaminant, to object to the Board. He can then obtain a second opinion as to whether the substance to be regulated is indeed an environmental contaminant and the Minister must consider this second opinion, in addition to that of his officials.

The Board was not set up to be a public forum to review the proposed regulation to determine whether or not the regulation is in the public interest. Nor should that be the Board's function. It is essential, of course, that regulations be developed in a manner so that they are in the public interest. However a public hearing in a Board of Review is not the most effective way to ensure this. Environment Canada is required to develop major regulations through the Socio-Economic Impact Assessment (SEIA) process so that the judgements that are made at the various stages of the regulatory process can be exposed to public scrutiny and open to public comment. That should prove to be an excellent method to ensure regulations are in the public interest. The Board of Review should not try to duplicate this SEIA process. It should only examine whether the substance the proposed regulation would control should be controlled under this Act as a contaminant.

#### Question 2

Note: The above also answers question 2.

Question 3

This question suggests there could be proposals by witnesses at public hearings and proposals by the Board itself to change a proposed regulation that has been objected to. Neither the Board, nor witnesses testifying before it, should be inquiring as to whether or how a regulation should be altered. The Board's investigation should be restricted to determine whether the substance that is to be controlled is indeed an environmental contaminant. In making that investigation section 6(2) refers the Board to the matters described in paragraphs 3(3)(a)(i) to (v). Nowhere does the Act refer to the Board or its witnesses proposing changes in the proposed regulation.

If before or during the hearing, the government changes the proposed regulation that has been objected to, and it is a substantial change, then the government should be required to reissue the regulation in the Gazette and give persons an opportunity to file objections with the Board under section 5(3). If the change the government initiates is not substantial, but only formal, then there would be no need to follow this procedure and the hearing could proceed so long as the objections to the proposed regulation were not withdrawn.

Perhaps, as the questionnaire suggests, this could lead to repetitious public hearings. However if there are substantial changes to a regulation, you in effect have a new regulation. In that case the Act gives affected parties a right to object to the Board and this right should not be abrogated.

Question 4

Subparagraphs (a) through (d) assume that the Board, or perhaps another party, should screen notices of objection so that only certain objections would lead to a Board hearing. This is not contemplated in the Act. Section 5(3) permits any person having an interest in the matter to file an objection and it is then mandatory under section 6(1) for the Board to be established to hold a hearing. Sections 7(4) and 7(5) are similarly worded. Section 6(2) also allows knowledgeable or (not and) interested persons to appear before the Board to present evidence and make representations. That would indicate that the term "interested person" should not be interpreted to be restrictive. It would have been an easy matter for the legislation to require persons to be both interested and knowledgeable in order to make presentations, but this was not done.

Since there is nothing in the Act disqualifying "frivolous" objections, there should be no attempt to design procedures to accomplish this purpose.

However, if the Act is to be amended, it would be useful to incorporate provisions enabling the Minister to disregard a notice of objection that is filed if that objection does not relate to the question of whether the Environmental Contaminants Act should be applied to regulate the substance in question. For example, the Board should not be called on to hold an inquiry if there was an objection that the proposed regulation could lead to economic or social hardship. Unless such an objection also questioned the nature and extent of the danger posed by the substance, it should not be heard.

Subparagraph (e) of question 4 deals with the need for procedures to provide for withdrawal of an objection to a proposed regulation after the Board has been established to hear that objection. If the objection that initiated establishing the Board is withdrawn then there is no basis for the Board to continue its hearing. We would think that the procedures needed to terminate the hearing should not be difficult to establish and our only comment would be that those procedures should not impose a penalty for withdrawing a notice of objection. Such a penalty is not contemplated in the Act, nor would it serve any useful purpose.

The question suggests that if the Board considers that a basis for a substantial objections does exist in fact, then the Board should proceed with the hearing even though the objector had withdrawn his objection. This is based on a premise that the Board should have an extensive role in examining the proposed regulation. In our view, this is not its purpose. The Board is only established to give the objector an opportunity to obtain a second opinion as to whether a substance is an environmental contaminant that needs to be regulated under the Environmental Contaminants Act. Once objections to a proposed regulation are withdrawn, the Board has no role to play and should not hold any inquiry.

#### Question 5

This question also assumes a wide involvement by the Board in the regulatory process. Section 3(4) of the Act establishes joint advisory committees that will be involved in gathering information to make initial assessments as to whether a substance needs to be regulated.



and what regulatory measures may be required. The Board of Review has nothing to do with this initial regulatory function and is only supposed to look at the substance after a regulation has been proposed and objected to in order to determine if that substance is indeed an environmental contaminant. In its investigations the Board might make use of the information a joint advisory committee had gathered, so long as this did not improperly lead to the disclosure of confidential information.

#### Question 6

Question 6 deals with the procedures that should be followed by the Board in the course of its inquiry and is best answered by the Board seeking the assistance of an administrative tribunal lawyer from the Department of Justice who can advise as to what approach should be taken in carrying out inquiries pursuant to the Inquiries Act. However we do have some comments on the specific questions that were asked.

The Board should not take an "inquisitorial" approach. It should restrict itself to asking witnesses questions and receiving whatever evidence and representations that are presented.

If there are parties with opposing viewpoints, a strict adversary approach should not be adopted as the Board procedures should be kept as informal as possible. The purpose of the Board is to give those who file objections an opportunity to be heard, not to engage in protracted adversarial hearings. As a result, only the Board should be able to ask questions and not the parties, unless the Board gives its consent to one party asking questions of another. To facilitate the informality of the proceedings these questions should not be referred to as cross-examination.

All evidence received at public hearings should be made available to interested parties and there should always be a formal transcript of the proceedings. The Board will be giving advice to the Minister and it is important that interested parties that wish to comment to the Minister after an inquiry be able to refer to the proceedings of the inquiry.

Notice in the Canada Gazette, in addition to specific notice mailed to the parties objecting to a proposed regulation, should be sufficient notice for the Boards's inquiry.

No funds should be made available for "public interest" representations at the hearings. This is not provided for in the Act and would be contrary to much needed fiscal restraint by governments.

Records should not be kept of the executive sessions of the Board as a transcript of the proceedings will be sufficient to assess and comment on the information that was presented to the Board.

Interested parties have a right to know the facts upon which the Board develops its recommendations to the Minister. They do not have a right to know the decision making process the Board went through in reaching its decision.

The concept of interested or knowledgeable person in section 6(2) should be interpreted very broadly. To be considered interested a person should not be required to demonstrate a pecuniary interest.

Question 7

The purpose of the Board of Review is to determine scientific questions concerning the nature and extent of danger posed by a substance to determine if it is an environmental contaminant. Therefore the Board should be composed of scientists and especially bio chemists. Ideally there should always be a Board member from industry who is knowledgeable about the substance under investigation.

There should be no special "conflict of interest" guidelines for the Board and this should be dealt with according to normal common law rules.

There should be no special formal process established to advise the Minister in relation to specific appointments to the Board. This should be left to the Minister's discretion on a case-by-case basis. We are confident the Minister will act responsibly in appointing members to the Board.

Question 8

Funding the Board should be the responsibility of the Minister of the Environment and the Minister of National Health and Welfare as they are charged with the task of establishing the Board. We would not expect the Boards to act partially because funding was provided from existing departmental resources.

A Board will only be established if there is a notice of objection to a proposed regulation and there is no way of knowing how frequent such notices of objection will be. Therefore we do not believe it

would be desirable to anticipate a need to make available funds for a certain number of Boards per year. However this may be necessary because of budgetary procedures within the Department. If that is so we have no comment on what procedures should be used to allocate departmental resources.

April 18, 1980

To Thompson  
ENVIRONMENTAL CONTAMINANTS  
CONTROL BRANCH  
DATE 22-04-80  
File  
Number 4402-78/P15-30

03165

L. G. McConnell, Vice-President Production & Transmission  
Telephone 592-4101

APR 23 1980

March 31, 1980

Our File: TG-08126.05

Mr. M. Cohen, QC  
Chairman, PCB Board of Review  
Environment Canada  
14th Floor, Place Vincent Massey  
351 St. Joseph Boulevard  
Ottawa, Ontario  
K1A 1C8

Dear Mr. Cohen:

Our views on the Environmental Contaminants Act,  
with specific reference to Boards of Review and your  
questionnaire, are listed below.

Question 1

It is our opinion that the Board of Review was  
established to impartially evaluate the soundness of the  
proposed regulation. In this sense, the Board has a wide  
sphere of influence.

Question 2

The Board should review the regulation from a  
scientific and practical viewpoint, eliminating the emotional  
aspects as much as possible. In the public interest, the  
scope as set out in our answer to Question 1, would be most  
beneficial, eg, we recently objected to the proposed PCB  
regulation on the basis that it would be uneconomic for us  
and, therefore, the general public to replace all our PCB-  
filled tramp iron magnets. Preventative maintenance and  
general maintenance was to be banned under the proposed  
regulation. Our objection was upheld, a decision which we  
believe was in the public interest.

Question 3

Board of Review recommendations, providing im-  
partiality is undisputed, should be incorporated into the  
regulations which would then be final. This would eliminate  
repetitive Boards of Review.



Mr. M. Cohen

March 31, 1980

Question 4 (a-c)

Very few companies or groups of individuals make spurious objections to proposed regulations. Usually a considerable amount of time and effort is spent gathering background data for the objection. However, the final arbiters on whether or not an objection is frivolous should be the Board of Review. This would maintain the impartiality of the decision-making process.

Question 4 (d)

We took the term "having an interest therein" in the broadest concept, as follows: "Anyone interested enough to have objection to a regulation and informed enough to have valid reasons for the objection."

Question 4 (e) (i and ii)

Procedures must already be established for the withdrawal of a notice of objection. As mentioned earlier, Ontario Hydro withdrew its objection to the proposed PCB regulation on the basis that the section in question would be reworded. The altered regulation will allow the maintenance of tramp iron magnets. We see no reason why penalties should be imposed when valid objections are withdrawn for valid reasons.

Question 4 (e) (iii)

Under the Environmental Contaminants Act, 60 days are allowed for objecting to the way in which a regulation has been worded. If interested parties have objections, they will do so within the time limit. We see no point, therefore, in establishing a Board of Review for every regulation drawn up under the act.

Question 5

The joint Advisory Committee's sole purpose is to obtain the information and data required for the formulation of the regulation. It will not be formed of impartial members.

Members of the Advisory Committee could supply background information to the Board of Review.

Mr. M. Cohen

March 31, 1980

Question 6 (a-d)

The Board of Review should seek information from both the proposers and objectors of the proposed regulation. It is their duty to form an impartial opinion of the regulation based on the evidence presented by each side. The role of the board members should, therefore, be somewhere between passive and "inquisitorial."

Question 6 (e-g)

The format and rules governing funds, records, etc, for attendance at such a board could follow the same lines as those laid out for courts of law.

Question 6 (h)

It is our opinion that the term "interested and knowledgeable person" should be taken to mean just what it says, in the broadest concept. Theoretically, the greater the data base, the better the final product.

Question 7 (a)

The members appointed to the particular boards should be knowledgeable, and have varied backgrounds encompassing the area covered by the regulation, ie, economists, chemists, lawyers, etc. The cross-section selected to sit on an individual board would depend upon the purpose for which the board was convened.

Question 7 (b)

In view of our previous comments, it is obvious that we feel that "conflicts of interest" should be avoided. Guidelines regarding "conflict of interest" should be established for board members.

Question 7 (c)

Providing the "conflict of interest" problems are resolved, we have no further restrictions on how the members are chosen.

Mr. M. Cohen

March 31, 1980

Question 8

To obtain the most out of the Board of Review, financial and administrative support is essential. There is no reason why the impartiality of the board should be questioned.

Arrangements are made for the impartial operation of law courts in many centres. We fail to see why it should not be possible to arrange just four Boards of Review per year.

We hope you find our comments useful. If you require further clarification, could you please contact Mr. D.K.A. Gillies, at 592-4614, who will be pleased to help.

Yours truly,



Vice-President  
Production and Transmission

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APR 03 1980  
*W*

March 26, 1980

Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th floor, Place Vincent Massey  
Ottawa, Ontario  
K1A 1C8

To	Mr. Thompson
From	Mr. Cohen
Subject	PCB Board of Review
Date	March 26, 1980

Dear Dr. Thompson,

I am writing in reply to the letter dated March 5, 1980, sent to us by Maxwell Cohen, Q.C., Chairman of the PCB Board of Review which was set up under the Environmental Contaminants Act in late 1979. Undoubtedly the establishment of a process of Boards of Review under the Environmental Contaminants Act was deemed a valuable aid to Environment Canada in its evaluation of proposed amendments to environment regulations. Being outside the formulation of policy and the administration of the Act, except in so far as regulations impinge upon the operating conditions of the industrial concern with which I am associated, I am reluctant to ascribe any particular objective to the establishment of a competent Board of Review in these circumstances. As said by Mr. Cohen, it must have a purpose over and above the replacement of the technical expertise of the Department and of being a tool for the fulfilment of Government policy. I see it rather akin to a zoning board of appeal whose function is to objectively evaluate proposed changes to the status quo in a particular interest area, in other words, I see it as a quasi-judicial body. In some cases there appears to be a wide range of scientific opinion as to the detrimental qualities of certain chemical substances and their dangers to human health and welfare and the environment. It would appear that Parliament has provided a more or less adversary forum in order that all relevant views can be aired.

As to question three as posed by Mr. Cohen, it appears to me that any change from a proposed regulation, unless it is of a sweeping nature, would not require further investigation by the Board of Review as the initial enquiry should have winnowed out all but the salient aspects of the dangers inherent in the use and handling of a particular chemical compound. It would appear to lie in the discretion of the Minister as to the magnitude of any proposed change requiring the Board of Review to re-convene or another Board to be established.

.../...



Dr. Hazen Thompson (cont'd)

As the purpose of the enquiry by the Board of Review is to obtain all relevant information, I believe that the widest possible interpretation should be given to the role of an objector. In this respect I would like to see the Board itself set its own rules as to what it considers to be a valid notice of objection and who therefore has an "interest" in the proceedings. There is of course the inherent disadvantage of having to deal with a number of objections which will be considered frivolous by any standard, but at least there can be no complaint that a Board of Review has failed to act in an appropriate manner to evaluate all the information that should be brought to its attention. In partial answer to this question I would say that it may tend to undermine public confidence if the assessment of the materiality of any objection were left to the discretion of the Department.

As to the withdrawal of a notice of objection, I am in the embarrassing position to say that any remarks I have can be treated as having an element beyond that of someone who has not initiated such a withdrawal. In defence of this action I will say that the objection filed by this Company in the PCB matter was done so as a result of a misunderstanding as to the effect of the proposed amendment to the PCB regulation. Perhaps this type of misunderstanding could be avoided if the proposed amendments to regulations were given wider publicity and explanation.

Once a Board of Review has been established, I would personally favour that it continue its enquiries to the point of delivering a report regardless of the withdrawal of significant objections. Even if the Board merely acts to confirm the proposed action of the Department, it has served a useful function. In the case of the PCB regulation it became obvious that the real cause of concern in industry is the fact that there is no effective and safe method of disposing of toxic substances of this nature in Canada. It is a problem which industry believes the Department should be taking a lead to resolve, and consequently a finding of this nature by a Board of Review should have some impact on the Department and its Minister.

.../...





Dr. Hazen Thompson (cont'd)

I personally see the existence of a joint advisory committee as provided for in paragraph 3.4 of the Act as a preliminary step to the appointment of a Board of Review. It is the instrument under which the two Departments can develop a coherent case to present before the Board.

The procedures of the Board will have to vary somewhat with the nature of each enquiry. Surely in certain cases it will be appropriate to proceed on a strictly adversary basis when major chemical manufacturers who have a significant financial interest in protecting markets face a Government objective of eliminating the use of these chemicals. In more general enquiries an information gathering approach would appear to be more appropriate. Other than establishing general guidelines to prevent a Board of Review straying too far from the subject matter of the enquiry on the one hand and preserving the generally accepted standards of natural justice on the other, I believe that a Board of Review should be able to establish the procedures that best suit its area of enquiry. This approach leads to the selection of members for Boards of Review who can best fulfil these objectives.

Yours very truly,

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B.W. Wasson

Vice President, General Counsel  
and Secretary

0322

DALHOUSIE LAW SCHOOL HALIFAX CANADA B3H 4H9

April 24, 1980

To	<i>Thompson</i>
ENVIRONMENTAL CONTAMINANTS CONTROL BRANCH	
DATE <i>29-04-80</i>	
File Number	<i>4402-78/P15-20</i>

Dr. Hazen Thompson  
Executive Secretary  
P.C.B. Board of Review  
Environment Canada  
14th Floor  
Place Vincent Massey  
351 St. Joseph Blvd.  
Ottawa, ON  
K1A 1C8

Dear Dr. Thompson:

Dr. Arthur Hanson, Director of the Institute of Resource and Environmental studies at Dalhousie has asked me to respond to Maxwell Cohen's letter of March 5, 1980, since I teach Environmental Law both within this Faculty and to Dr. Hanson's students. While I do not have specific experience with the "Environmental Contaminates Act" I will attempt to respond herein to the items raised in the questionnaire which was forwarded.

My comments are as follows:

1. The purpose in establishing a board of review seems to me to be a combination of the items mentioned in the questionnaire. I see it as an impartial assessment of the danger posed by a particular contaminate and of the soundness of the proposed regulations in dealing with the danger posed. As an integral part of this process, the "objector" and other members of the public should have the opportunity to have their views considered. As well, I wonder whether the board of review process was seen as relevant to questions of constitutional validity. Regulation of the release of contaminants raises serious questions of interference with provincial rights over property and civil rights. Thus, the triggering phrase in s. 5(1) requires the substance to constitute "a significant danger in Canada or any geographical area thereof to human health or the environment". Perhaps involving an independent body in the assessment of the existence of this danger and of the need to regulate release to the extent done in the proposed regulations would act as a buffer weakening the possibility of successful constitutional challenge.

Dr. H. Thompson

Page 2

April 23, 1980

2. Scope of review should be as stated above. Additionally, any synergistic combinations of the particular contaminants under review should be sufficient to expand the scope to include the substances in combination with which the contaminants under review interact.

3. Last minute changes in the proposed regulations should not automatically require fresh public hearings. The board should be charged with the responsibility of deciding on the "materiality" of the changes and should be required, where the change is material, to hold a new hearing. Determining what constitutes a valid notice of objection and what objections should be considered frivolous ought not to be done internally within the department. A simple appeal ought to be permitted, perhaps to the chairman of the last constituted board of review or to a judge of the federal court.

4. On the question of what interest must be had, I believe anyone expressing an interest ought to be found to have "an interest". Presumably everyone, at least in the geographical area affected, would have health concerns that would justify intervention. A "notice of withdrawal" system would not hurt, however, it should not result in the automatic termination of the inquiry. A discretion should reside in the board of review as to whether or not it will continue the inquiry.

5. The advisory committee, unlike the board of review, would not exercise a judicial function and would likely act administratively as a panel of experts rendering advice to the two ministers on matters that concerned them. The extent to which they would have regard to the "public interest" as opposed to technical questions would be much more limited than that of the board of review.

6. The board should apply in a liberal fashion the rules of natural justice. This can, and should, include an activist role in obtaining appropriate scientific information and in compelling witnesses who have something to add to attend. Those parties who wish to participate in the process and be accorded the right to present evidence and to cross-examine witnesses should generally be allowed to do so. If the process becomes unwieldy, and cannot be voluntarily controlled, then participants who duplicate the same interest and/or viewpoint can be eliminated. The object would be to obtain the widest sampling of viewpoints from those interested enough to play an active role. Funds should be made available, as was done for example by the Berger Commission on Northern Pipelines, to fund "public interest" representation.

Dr. H. Thompson

Page 3

April 23, 1980

7. Because the board of review is a legal creature with statutory guidelines to follow, and should be complying with the rules of natural justice, I believe a lawyer should be chairman of the board. Board members from the scientific and medical-public health fields seem particularly important to the composition of the board. Conflict of interest guidelines and a panel of potential appointees seems sensible.

8. No comment.

I trust the foregoing is of some assistance.

Yours faithfully,



Bruce H. Wildsmith  
Associate Professor of Law

BHW:CKB

cc. Dr. Hanson  
Environmental Studies

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OUR FILE:

YOUR FILE:

30 April 1980

Prof. Maxwell Cohen, Q.C.  
 Chairman, PCB Board of Review  
 c/o Dr. Hazen Thompson  
 Executive Secretary  
 PCB Board of Review  
 Environment Canada  
 14th Floor, Place Vincent Massey  
 Ottawa, Ontario  
 K1A 1C8

To	<i>A. Thompson</i>
ENVIRONMENTAL CONTAMINANTS CONTROL BRANCH	
DATE <i>5-05-80</i>	
File Number	<i>4402-78/P75-20</i>

MAY 07 1980  
*10*

03292

Boards of Review under the  
Environmental Contaminants Act

Dear Prof. Cohen:

Please refer to your letter of 5 March 1980 requesting my comments on the Board of Review Process established under the Environmental Contaminants Act.

Most of the questions posed in your letter appear to be addressed to the authors of the Environmental Contaminants Act and particularly to those responsible for drafting Sections 5 and 6 of this Act.

In my role of a technical advisor to the Ministry of Environment, Contaminants Control Branch, I have not been involved in any discussions, within the Ministry, on the purpose and objectives contemplated for the Board of Review.

continued.....





Prof. Maxwell Cohen, Q.C.  
c/o Dr. Hazen Thompson

- 2 -

30 April 1980

Please consider my comments as those of an individual, not representing any special interest group, government or association.

The following comments follow the sequence and reference numbers which appear in your letter:

(1) Main Purpose of the Board

The principal purpose of the Board of Review should be not only to "provide an impartial forum" as stated in paragraph (1) (c) of your letter but also to act as an arbitrator between the government and the objectors under Section 5 (3) of the Environmental Contaminants Act.

The Board's recommendations should advise the Minister to take one of the following three steps:

- Scrap regulations which are unnecessary.
- Delay putting into effect those regulations that should be amended.
- Overrule the objections and put the proposed regulations promptly into effect.

(2) Secondary Role of the Board

In addition to its main role as an arbitrator dealing with specific objections, the Board of Review could render a very useful service by explaining and publicizing the intent and benefits of the proposed regulations.

Public hearings conducted by the Board could infuse public support for good regulations and make them so much more effective. As an ultimate and perhaps too optimistic goal, the Board hearings could convert an objector into a zealous advocate of the proposed regulatory measures.

Also, the Board's inquiry conducted in accordance with Section 6 (2) may lead to the discovery of additional problems and identification of the need for additional regulations.

continued.....



Prof. Maxwell Cohen, Q. C.  
c/o Dr. Hazen Thompson

- 3 -

30 April 1980

(3) Last-minute Changes

It may not be desirable to have an inflexible policy with respect to the last-minute changes in any of the categories listed under (a), (b) and (c). The best procedure depends so much on the relative significance of a specific item and therefore the Board should have the freedom of choice in each individual case, rather than be bound by a rigid code of procedure.

(4) Notices of Objection

The Act is not explicit on what constitutes a valid notice of objection.

In case of toxic substances and their potential to become environmental hazards, any inhabitant of this globe qualifies as a person "having an interest therein". The government should not pass judgement on the validity of any notice of objection.

However, each objector should be contacted by the Ministry and an attempt should be made to explain the full meaning of, the reason for and all ramifications of the proposed regulation against which a notice of objection has been filed. No pressure whatsoever should be exerted on the objector to compel him to withdraw his notice of objection. All information given to the objector by the Ministry should be presented in a very objective manner with full disclosure of the sources of all data, statements and opinions.

To comply with Section 6 (2) of the Act, each notice of objection, no matter how trivial, unless voluntarily withdrawn, must be reviewed by the Board. The review process prescribed by the Act provides that the Board "shall give the person filing the notice of objection . . . . a reasonable opportunity of appearing before the Board, presenting evidence and making representations to it".

Therefore, it would appear that the Board cannot dismiss as invalid any notice of objection, which has been correctly submitted to the Ministry, without giving the objector a reasonable opportunity to appear before the Board. (Please refer to para. (4) (c) iii) of your letter.)

continued.....



Prof. Maxwell Cohen, Q.C.  
c/o Dr. Hazen Thompson

- 4 -

30 April 1980

Regarding your questions on the procedure for withdrawal of a notice of objection, I do not think that it would be practical to impose time limits and penalties for withdrawal. Until future experience proves otherwise, we should assume, that the probability of the Board of Review process being seriously and repetitively abused by frivolous or malicious persons, is not significant.

Regarding (4) (e) (ii) and (iii), I have no constructive suggestions to make, only an observation that I cannot find in the Act any basis for establishing a Board of Review unless a notice of objection has been properly filed.

(5) Role of Advisory Committees

Advisory committees established under Section 3 (4) of the Act should be "at-arms length" with respect to any Board of Review established under Section 6 (1).

The role of advisory committees is to participate in the process of developing new regulations. The Board of Review role is to provide an impartial forum for public discussion of the proposed regulations and to act as an arbitrator between the government and the objectors to the proposed regulations.

(6) Board of Review Powers

I have insufficient knowledge of The Inquiries Act to make any comment.

(7) Board of Review Composition

(a) Most of the regulations under The Environmental Control Act would involve legal, medical, scientific and/or engineering disciplines.

The Act stipulated that the Board shall consist of not less than three persons. As a minimum requirement, the Board should be composed of:

- Lawyer with arbitration experience
- M.D. specializing in public health
- Professional engineer or scientist with appropriate experience

continued.....



Prof. Maxwell Cohen, Q.C.  
c/o Dr. Hazen Thompson

- 5 -

30 April 1980

(b) & (c)

It would be desirable to prepare a list of potential Board Members, so that each appointment could be made expeditiously when the need arises. The list should contain personal resumes of all candidates including their qualifications as well as professional and business affiliations. This would help to select the best qualified individuals and avoid conflicts of interest. Suitable guidelines governing conflict of interest should be established and issued to all candidates.

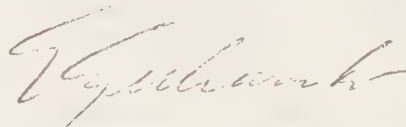
(8) Financial and Administrative Support

No comments.

\* \* \*

I have not answered some of your questions, particularly those of legal and administrative nature, where I felt my opinion would be of little value. I hope that my comments will be of some assistance to the Board in the preparation of the Second Report.

Yours sincerely,



E. Czerkowski, P. Eng.

ECz\*esv.





# ONTARIO MINING ASSOCIATION

10th FLOOR • 199 BAY STREET • TORONTO • ONTARIO • M5J 1L4

JAMES M. HUGHES  
Executive Director

(416) 364-9301

APR 21 1980  
*MS*

April 15, 1980

Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
Place Vincent Massey - 14th Floor  
Ottawa, Ontario K1A 1C8

To	Dr. Thompson
From	
Subject	21-04-Sc
File Number	14402-78/P75-20

Dear Dr. Thompson:

03156

Reference is made to the letter of March 5, 1980 from Professor Maxwell Cohen, Q.C., Chairman of the PCB Board of Review.

The Ontario Mining Association appreciates this opportunity to comment on the questionnaire regarding Boards of Review under the Environmental Contaminants Act. The astute and searching mind of Professor Cohen will indeed have a tremendous impact on the use and acceptance of future Boards of Review.


Rather than address each question separately, the OMA Environmental Committee reached a consensus which is endorsed by the Association that we should try to convey to you how Boards of Review might best meet the fiduciary duty given to them. The position is that Boards of Review would:

1. Function as pseudo Boards of Enquiry but that legal counsel would not be employed. Scientific evidence not legal opinion is desirable to provide a basis on which to assess the attributes of specific legislation. Legal counsel should be left to interpret the legislation.
2. Limit its recommendations to:
  - (a) Accepting or rejecting the Bill for which it was constituted.
  - (b) No changes in the Bill be permitted except by prior publishing in the Canada Gazette.
3. The control over elimination of toxic substances is the primary purpose of Department or Ministerial staff rather than a Board of Review. After all, the Minister has the final responsibility for the Department and for appointments of Boards of Review.



4. Whenever a "Notice of Objection" is filed, a Board should be constituted to review it and if the "Notice of Objection" is valid, proceed forthwith to hold a Board of Review. However, if in the Board's wisdom the "Notice of Objection" is frivolous or invalid, the Board should so state and promptly disband. The Board's findings could be published in the Gazette so that the public is made aware of their work and to show the Board's accountability to the public.
5. Joint advisory committees can serve the will of the Environmental Protection Service through "hands on" experience which may prevent unworkable legislation going beyond the point of no return. Their reports should be made available to the specific Board of Review.
6. A Board should consist of more than three members, and in the event that one of the members is incapacitated, three signatures would constitute a valid report.

Yours very truly,

  
J. M. Hughes  
Executive Director

JMH/eok

cc: OMA Environmental Committee  
OMA Directors

03114

## INCO METALS COMPANY

Copper Cliff, Ontario POM 1N0

Environmental Control  
Department  
Ontario Division

April 9, 1980.

To	Dr. H. S. Thompson
From	Environmental Control Department
Subject	Environmental Contaminants Act
Date	APR 15 1980
File Number	4405-10/17-80

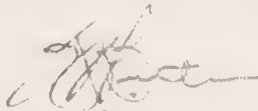
Dr. H. S. Thompson,  
Executive Secretary,  
PCB Board of Review,  
Contaminants Branch,  
Environmental Protection Service,  
Environment Canada,  
14th Floor Place Vincent Massey,  
Ottawa, Ontario K1A 1C8.

Dear Dr. Thompson:

I wish to have my comments expressed through the Environmental Committee of the Ontario Mining Association. The questionnaire sent to me regarding Boards of Review under the Environmental Contaminants Act.

Currently I am chairman of that committee.

Yours very truly,



H. R. Butler, P. Eng.,  
Supervisor,  
Environmental Control.

HRB/jv



Canadian Environmental Law Association  
L'Association canadienne du droit de l'environnement

8 York Street, 5th Floor South, Toronto, Ontario M5J 1R2, telephone (416) 366-9717

May 13, 1980

Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th Floor, Place Vincent Massey  
Ottawa, Ontario  
K1A 1C8

Dear Dr. Thompson:

Re: Boards of Review Under the  
Environmental Contaminants Act

Thank you for your letter of March 21, 1980 advising that the deadline for commenting on the questions set forth in Maxwell Cohen's letter of March 5, 1980 has been extended to May 1, 1980. Unfortunately for the reasons set forth in my letter of March 13, 1980, it has not been possible for us to comment on those questions within the time allotted.

However, I am enclosing two documents that hopefully will be of some assistance. One document is a copy of our 1975 submission on the Environmental Contaminants Act to the Standing Committee on Fisheries and Forestry. Pages seven and eight of this document relate to Boards of Review. The second document is a portion of a chapter that is presently being written by Joe Castrilli of our office for a soon-to-be published book. The enclosed portion of the chapter concerns the Environmental Contaminants Act.

Yours very truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

*RK Timberg*

Robert K. Timberg  
Counsel

RKT/fc

Enclosures

MAY 20 1980

HT

To	Dr. Thompson
ENVIRONMENTAL CONTAMINANTS CONTROL BRANCH	
DATE 16-05-80	
File Number	14402-78/P75-20

03407

BRIEF  
OF THE  
CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
Containing Recommendations on  
BILL C - 25  
The Environmental Contaminants Act

Presented to the  
Standing Committee on  
Fisheries and Forestry  
May, 1975

Prepared by:  
Heather Mitchell  
and  
J.F. Castrilli

CELA: A Word About Who We Are

The Canadian Environmental Law Association is a national non-profit organization of citizens, scientists and lawyers, dedicated to enforcement of present environmental laws and to their improvement.

The Association was founded in 1970 (along with the Canadian Environmental Law Research Foundation) in part because of the frustrations which citizens face, with reference to environmental problems, in dealing with a seemingly inaccessible legal and administrative system, and in part because of a lack of knowledge of those legal remedies that do exist to stop environmental degradation.

In order to fill this gap, the Association established a panel of about ninety lawyers in Ontario (and some in other provinces) who are willing to take cases, without charge if necessary, in environmental situations where legal assistance would otherwise not be forthcoming.

Through our Toronto office, lawyers with the Association provide advice to approximately 500 complainants per year, which in many instances result in positive action by government agencies or in the complainants obtaining further legal advice and assistance through the CELA panel of lawyers.

In order more effectively to inform the public about their environmental rights and remedies, and the legal reforms necessary for the establishment of a healthier and safer



environment, the Association and the Foundation jointly published, in February, 1974, Environment On Trial: A Citizen's Guide to Ontario Environmental Law, the first Canadian book outlining these areas in layman's terms.

Because of the work being done in this critical area by the Association, it has attracted a membership of about 500 from every segment of the public, in addition to the membership and support of many local, provincial and national organizations.

As human technology has grown exponentially, so has the number of industrial byproducts which are introduced into the environment, frequently with little or no pre-production research to discover possible deleterious effects. Even where attempts have been made to analyze and predict hazards, advances in scientific knowledge often, years later, expose the inadequacy of the prior research methods and the inaccuracy of conclusions derived from them.

For example, carcinogenic substances often require a ten or twenty year latency period to reveal their effects. Only recently did scientists discover that vinyl chloride, used for years in the manufacture of plastics, is linked to a fatal liver cancer; that freon, the propellant widely used in aerosol cans, is gradually disintegrating the ozone layer that protects the earth's population from cancer-causing ultraviolet radiation.

Environmentalists agree that objectors to the use of new substances should usually have the burden of proof. However, when they challenge some activities as being serious health hazards where the probability of harm cannot be determined with certainty, public policy requires that the manufacturer of a substance should have to demonstrate safety of its products. Such a modification of the usual burden rules is in keeping with a traditional justification for shifting the burden of proof: that the greater burden should be on the person with the greatest access to information. In addition, it seems reasonable that the person who

-2-

stands to gain most should be responsible for inflicting no harm on the public.

Presently, the data necessary to assess the impact of chemicals on human health and the environment is often not made available, partly because many manufacturers are reluctant to release information relative to the chemical substances which they produce. In some instances, the absence of data has meant that environmental health disasters have occurred before toxic substances could be identified.

To increase public support of this bill, it should require technology assessment of new substances prior to production. Secondly, it should be seen by the public to sanction strong regulatory action once toxic contaminants are made known. Thirdly, to have the greatest possible public confidence and support, it should be seen to involve the public as much as possible in mechanisms designed to evaluate and control potential hazards to health and environment.

To the extent that Bill C-25 is deficient in any of these respects, the public cannot have confidence in the Bill's stated aims of protecting "human health and the environment from the release of substances that contaminate the environment".

-3-

It is our submission that Bill C-25 would be strengthened if all notices required under the Act were published in a newspaper of general circulation. Reports of a Review Agency should be made public, and notices of their existence should be given in general circulation newspapers. The Canada Gazette is simply not adequate for this purpose.

A timetable for the coming into effect of the legislation ought to be in the Bill. With a firm timetable, regulations makers will be encouraged to produce regulations within a reasonable time. Also, regulation makers ought to consult with people outside the industry being regulated before drafting begins.

For the Bill to be seen as giving meaningful protection, industries must be required to report on new substances they intend to manufacture together with quality and safety test methods and results. It is our submission that mandatory reporting is essential -- otherwise, the government will continue to be looked to for clean-ups and blamed for not knowing how toxic released substances are

An amendment to The Statistics Act might be introduced to make information already collected on the quantity and place of use of each biologically active ingredient in Canada available.

-4-

Comments on sections of  
Bill C - 25

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Section 2. (2)

It is submitted that this section should read:

"This Act is binding on Her Majesty in right of Canada  
and of any province and any agent thereof."

Section 3

It is our submission that this section should be changed to require the manufacturer or the importer or the distributor of a new substance to report the existence of the substance and the chemicals it contains to the Minister.

The section also should be amended to require reporting to the Minister of all releases of contaminants either over the present regulations or where there are no regulations, all releases. The industries which are using the contaminants should also be required to submit the standards they presently use to ensure the safety of their workers.

There should also be sanctions for failing to report.

The Act does not at present require any reporting and it is our submission that the Minister will not be in a strong position to take action to ensure the safety of humans and the environment if reports are not made to him. Obviously, inspectors cannot be everywhere at all times.

Section 3. (1) should be amended in the last line so that the Minister or the Minister of National Health and Welfare shall do the things set out in this section.

Comment: It is our submission that these Ministers should have the duty to do the things set out in sections (a) and (b) and not just the permission.

Section 3. (2)

A subsection prohibiting a person with a conflict of interest sitting on an advisory committee should be added.

A subsection requiring any committee to represent the interests of industry, government, the public and the environmental interest, should be added.

This section should be amended so that an advisory committee when set up should be required to publish reports on the contaminants it reviews, and the measures it suggests to control the presence in the environment of those substances.



Subsection (2) should be extended to make it clear that submissions to the Advisory Committee, oral presentations to the Committee and any report of the Committee will be made public.

Comment: It seems clear to us that the public has a right to know of contaminants in the environment whether or not they are judged to be hazards at the time such a review takes place. It is our experience that members of the public are more likely to over-react with anxiety when information on possible hazards is withheld from them.

#### Section 4

Section 4 should be amended so that the Minister can get some data on which to base his suspicions. We suggest that the manufacturer of any new substance be required to submit data on the contents of the substance, the test results, the methods of testing, etc. to the Department of the Environment and/or the Department of National Health and Welfare before a substantial financial commitment is made to manufacturing the substance. Such information could then be reviewed by the Ministry and then the Minister could take the actions set out in section 4.

#### Section 4. (1)

This section should be amended to read that the Minister shall take any or all of the following steps.

#### Section 4. (1) (a) and (c)

There seems to be a distinction between these two sections so that anybody engaged in the importation or manufacturing of a substance might be required to do tests, but those who are engaged in any "commercial manufacturing or processing activity involving the substance" might not have to do any tests. It is our submission that the testing requirements should apply to "commercial manufacturing or processing activities".

#### Section 4. (d)

A subsection (d) should be added to specify the kinds of records which must be kept by each manufacturer, importer or industrial user of contaminants, notwithstanding Section 18 (i) which says regulations specifying what records must be kept may be made. At a minimum, the records must specify the trade name, the generic name, the ingredients, the toxicity of the substance, the quantities manufactured, imported, or used; if sold, to whom (including the address of the buyer), where substances on hand are stored, the safety of that location; the detoxification agent, the dilution agent, the appropriate cleanup procedures, the procedures to avoid human exposure and environmental contamination; the methods used to test for safety and side effects, and the results of those tests including historical data on human experience with the substance.

Once the information has been made available to a government ministry, the subsection should specify that the ministry must keep the information in a place where it is accessible to the public. Such a subsection, of course, should also include the right of any person to inspect the information and make copies at a nominal cost.

Section 4. (2) (b)

This section should be amended to show a certain time. For example, it should read: ". . . to whom a notice referred to in paragraph (1) (b) or (c) has been sent shall comply with the notice within thirty days." If it is impossible to comply with the notice within thirty days, "the person to whom a notice is directed may apply for an Order from the Minister of the Environment to extend the time."

Section 4. (4)

This section should be amended to allow the right of the public to know what the substance is.

Comment: It is not appropriate just because a manufacturer asks that his information be kept confidential that it should be so kept. While there may be a need for keeping the proportions of ingredients which go into a certain formula confidential, as being a trade secret; or keeping sales information confidential as a matter of competitive edge, manufacturers should not be allowed to keep from the public information on contaminants which may affect the general environment or the health and safety of some members of the public.

CONSULTATIONSection 5. (1)

This section should have an additional sentence at the end as follows:

"The Ministers shall have fifteen days after they become satisfied as set out in section 5. (1) to consult the governments of the provinces or any other departments of the government of Canada, and those governments and departments shall have a further thirty days in which to reply. If no replies are received within that period, then consultation in accordance with section 5. (1) shall be deemed to have taken place, and the Minister and the Minister of National Health and Welfare shall proceed."

Section 5. (2)

Somewhere in the Bill before section 5. (2), there ought to be a requirement that the Governor in Council establish the schedule spoken of in subsection (a).

Section 5. (1) (b)

This section should be amended so that the Minister shall "cause to be published in the Canada Gazette and in at least one newspaper of general circulation..."

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Comment: It is our submission that notice in the Canada Gazette will certainly not reach all the people who might have objections. Some more effort than publication in the Canada Gazette should be made to allow the public to participate in a meaningful way.

#### Section 5. (3)

The first line of this subsection should be amended to read: "Any person having an interest therein or any concerned member of the public may . . ." This would bring the subsection into line with subsection 3(2) which recognizes that "concerned members of the public" have a valuable contribution to make.

### ENVIRONMENTAL CONTAMINANTS BOARD OF REVIEW

#### Section 6. (1)

This section should be amended to detail who is going to be on the Board. In the amendment there should be a prohibition against present civil servants, people who have been civil servants within the previous two years, or people who have been on contract either to the Ministry of the Environment or the Minister of National Health and Welfare within the previous two years becoming members of the Board. In addition the amendment should make clear that the Board will be representative not only of industry but also of the non-industry scientific community and the environmentalist community.

Comment: It may be that the Board is not to be a full time one. In this case under the present section it would probably be drawn on ad hoc basis from civil servants who were handy in Ottawa or a location where the Board would sit. This might mean that the very civil servants who had been engaged with industry and the drawing up of regulations or the naming of substances to this schedule would sit on the Board. It is our submission that there ought to be prohibition against this kind of natural bias appearing on the Board.

#### Section 6. (4)

This subsection should be amended to state that a transcript of all the evidence, and all documents presented to the Board shall be deposited in a convenient place where any person may inspect them and may copy them at a nominal fee.

Comment: Since the hearings appear to be open to the public by reason of subsection (1), while anybody filing a notice of objection should be afforded a reasonable opportunity of appearing, then this provision is merely an administrative tidying up so that an interested person does not have to sit through a hearing in its entirety but may check back on the documents later.

Section 6. (5)

It is our submission that making the report public within thirty days must be mandatory. As protection for trade secrets, an amendment could be made to allow for the deletion of quantities used in formulae (but not the contents of the substance) or for deletion of identifying material such as the names of persons or the sales figures presented to the Board.

As an alternative the decision of the Board not to make its report public should be appealable to perhaps the two Ministers together or the Minister of the Environment.

In any event a Board's decision not to make a report public ought itself to be made public and the Board ought to be required to give written reasons for withholding the report.

Comment:

Here an instructive example is that of the report concerning arsenic in the lake near Yellowknife. This report was only produced upon close opposition questioning and once produced it was clear that public interest had not been served by keeping it confidential.

SCHEDULESection 7. (3)

Since this subsection clearly deals with emergencies requiring fast action this subsection should be amended to impose an obligation to act upon the Governor in Council therefore in line 9 of this subsection an amendment should be made so that the line reads ". . . or the environment, he shall, notwithstanding-  
... "

Section 7. (4)

This section should be amended so that the period of time for filing notices of objection is 15 days.

Comment:

Since this subsection deals with emergencies 60 days is clearly too long a time to wait for notices of objection. An industry who had been subjected to an order preventing, say, the manufacture of a certain substance, might effectively be put out of business by the wait of 60 days. The amendment should be to 15 days but the notice should be published in the Canada Gazette and in several newspapers of popular circulation, in that way it is far more likely that it will be brought to the attention of anybody who might want to object.



Section 7. (5)

It is our submission that this subsection needs to have set out more provisions as to what happens during the 60 days of an emergency when the Board is waiting to hold its hearing. If a substance is seized, for example, there are no provisions here for its storage for getting it back or for preventing it from decomposing, etc. There is no provision for compensation if the Governor in Council has wrongly decided an emergency situation exists.

The duties of a Board appointed under this subsection should be repeated from Section 6 (2). (Perhaps a more efficient way of achieving the same result would be to amend Section 6 (1) to read "Upon receipt of a notice of objection referred to in subsection 5(3) or 7(5)")

A Board hearing triggered by a notice of objection to an emergency order should be public, and should give "the person filing the notice of objection and any other interested or knowledgeable person a reasonable opportunity of appearing before the Board, presenting evidence, and making representations" as set out in Section 6 (2).

Section 7. (7)

It is our submission that this whole subsection should be removed from the Act.

Comment:

If orders made in emergency situations by the Governor in Council are not effective until regulations are in force under paragraphs 18 (a) to (e), then, since no regulation is effective until it is published in the Canada Gazette, Section 7 (7) takes away all the emergency power of Section 7 (3) in a situation where a new substance, not yet within the regulations is suddenly discovered to be a dangerous contaminant.

If the Governor in Council has to make and have published a regulation under Section 18 (a) to (e) before using his emergency powers under Section 7 (3), then, practically speaking, the Government would have to inform a person to whom the regulation would be directed of its intention to use the emergency power after a regulation was in force. The only effective way of dealing with a present emergency would be for the Government to give a warning to stop immediately, then make and have published a retroactive regulation, legitimatizing the informal warning. Retroactive regulations do not seem, on civil libertarian grounds, to be a fair exercise of emergency powers.

It is our submission that the better procedure would be to remove Section 7 (7) as it is an impediment to swift effective emergency action.

Section 7. (8)

This subsection should be amended so that the Governor in Council when deleting will give reasons for so doing. These reasons along with his order ought to be published in at least the Canada Gazette.



OFFENCESSection 8. (1)

This section should be amended to read "no person shall, in the course of any activity, wilfully release, or permit the release of any substance known to be of significant danger to health or the environment.

No person shall, in the course of any activity, wilfully release, or permit the release of, a substance specified in the schedule or any substance that is a member of a class of substances specified in the schedule into the environment in any geographical area prescribed in respect of that substance or class of substances or, if no geographical area is so prescribed, in Canada, . . . ."

Comment:

It is our submission that there should be no release of any substance which is of significant danger to health or to the environment anywhere in Canada. Then the next part of this section should detail as it does the classes of substances where certain tolerances are acceptable for health. However it is our submission that this subsection should apply "to any activity" and not just to "a commercial manufacturing or processing activity."

Section 8. (3)

This subsection should be amended to require definitions of "good manufacturing practice" in the regulations.

Comments:

While it is apparent that the subsection (2) and subsection (3) must necessarily be read together so as to avoid placing undue hardship on industries which use substances containing small amounts of what would otherwise be considered dangerous contaminants, including the phrase "good manufacturing practice" will lead to considerable litigation on the definition of this phrase. While litigation is going on the effect on the environment or health of the use of the substance challenged on the basis that its use is not "good manufacturing practice" will be overshadowed. It is therefore our submission that tolerances or quantities must be listed so that industry has clear guidelines as to what will lead it into a situation of liability and what will not.

Section 8. (5)

This section should be amended to provide for a minimum fine and it is our submission that the minimum fine of \$1,000. a day would be appropriate.

The subsection should further be amended to allow for a fine based on a percentage of the profits made on the sale, use or processing of the substance found to be in offence under this section. It is our submission that one hundred percent of the profit would be appropriate sanction.

This section ought to be amended to provide that every person who contravenes this section is guilty of an offence and liable to be ordered to make restitution and/or to repair the damage caused by the escape of a containment and to be liable for an assessment of the cost of cleaning up the damage caused by the escape of the containment.

This section should further be amended to provide that fines assessed as a result of a conviction started by a private prosecution ought to be distributed on a 50-50 basis between the informant who made the charge and the Crown.

#### Section 8. (6)

This subsection should be amended to increase the time. If one year is the appropriate time then the phrase should be "from the time when the discovery of the event leading to the proceedings have been made". If, on the other hand, "from the time when the subject matter proceedings arose" is the appropriate phrase then the time should be at least six years.

### INSPECTION

#### Section 10

It is our submission that the records of the inspector's visits and his report on his findings should be available for inspection either in the Department of the Environment or the Department of National Health and Welfare offices or some other designated convenient place, during the normal business hours. Every person should have the right to inspect these records and to make copies at a nominal cost. Provision should also appear allowing for deletions of the information which would protect trades secrets.

#### Section 10. (2)

The first sentence in this section should be amended to read "the owner and the person in charge. . . ."

#### Comment:

It is clear that both the owner and the occupant ought to give inspectors their help. For example there might be a situation where an occupant has no access to records which are kept by an owner in a safe on the premises. In such a case an inspector ought to be able to require the owner to open the safe and produce the documents therein.

SEIZURE AND DETENTIONSection 11.Comment:

The two sections dealing with seizure and detention should be amended to make sure that pending an investigation none of the possibly hazardous substances can be used in any way. In addition a provision should be contained in these sections so that in an emergency total ban on the use of a suspected substance is possible for a short period of time.

Section 11. (4)(b)(ii)

This subsection creates a time gap. Under the subsection the seized substance cannot be retained after sixty days unless proceedings have been instituted whereas elsewhere in this statute the time for commencing a prosecution is one year.

Section 11. (5)

This section ought to be amended to define what security measures must be taken if a contaminant is stored in a place where it is found. There should be definite security measures so that the substance is not used pending an investigation or a prosecution; so that nobody on the premises can get at the substance; and so that a record is kept of who has access to the storage place and when such persons have near it.

Comment:

This appears to be a unique section where a possible accused has control over the Crown's evidence until the date of prosecution without safeguards suggested above or records being kept then one would not be able to prove the continuous possession and care of the substance at trial.

Section 12. (4)

This subsection should be amended to include a provision for the retaining of a sample of the substance which may later be produced in evidence.

FORFEITURESection 13.

This section should be amended to include provisions for the disposal of forfeited substances and to include assessing the cost of detoxification of a substance against the person in charge or the owner of the premises on which the substance was seized.

GENERALSection 14.

This section seems to exclude employees. It is our submission that they should be included.

REGULATIONSSection 18.

This section should be amended to include a requirement of public participation in the regulatory process or in the vetting of regulations before they are proclaimed. A provision should also be included to require mandatory non-industry participation in the making of regulations.

DRAFT

Exclusive government control of procedural requirements may also result in procedural, if not substantive, injustices. In 1977, for example, Environment Canada published a proposed regulation in the Canada Gazette pursuant to the Environmental Contaminants Act respecting control of PCBs.<sup>64</sup> The regulation was intended to prevent the use of PCBs in any new goods other than electrical capacitors and transformers. The department in effect acknowledged that the regulation merely recognized the existing situation as industry had already eliminated most non-electrical uses of the substance anyway.<sup>65</sup> The National Indian Brotherhood (NIB) filed a notice of objection to the proposed regulation on the ground that it did not go far enough towards eliminating the PCB problem.<sup>66</sup> NIB argued, moreover, that if it was only the first of several regulations then there ought to be a firm timetable for their promulgation as the piecemeal approach could otherwise lead to unwarranted delays. No such timetable existed in the proposed regulation. It cited the example of Clean Air Act emission standards for mercury which were first expected in 1972 but which were not promulgated until 1978.<sup>67</sup> The department neither acknowledged in the Canada Gazette that a notice of objection had been filed<sup>68</sup> nor empaneled a Board of Review to hear the matter as required to by section 6(1) when an "interested person" files an objection. The rationale given by the Minister was that the department did not regard the NIB notice as an objection and therefore should not be obliged to establish a Board of Review everytime someone argues on "general grounds" that a proposed regulation does not go far enough or goes too far.<sup>69</sup>

By contrast, in 1979, when two companies filed notices of objection<sup>70,71</sup> to a proposed government amendment to the first PCB regulation<sup>72</sup> the department



- 2 -

established a Board of Review to hear this "first challenge to the Environmental Contaminants Act."<sup>73, 74</sup> The purpose of the amended regulation was to prohibit the use of PCBs as new filling, or as make-up, fluid in the servicing of electrical transformers. However, at least one company objector was reported as saying that it did not object to the amendment itself but simply was concerned because "we have lots of transformers filled with PCB and we just want to use up what we have on hand."<sup>75</sup> Moreover, government spokesmen indicated that a 1978 consultant's-government workshop to determine if PCB was needed as a makeup fluid in electrical equipment concluded that "PCB was not necessary and that we should have included this amendment in the original regulations."<sup>75</sup> (emphasis added). While the two companies withdrew their objections in late 1979, the board inquiry proceeded without them.<sup>76</sup>

Clearly, the disparity in the government's treatment of the two cases is cause for concern. In the first case (the NIB objection) the government refused to hold a hearing for somebody who clearly indicated that he was objecting to the adequacy of a proposed regulation. In the second case (the companies' objection) the government decided to hold a hearing despite some indication that at least one of the objectors was not really objecting to the adequacy of the proposed regulation. Moreover, the Board went on to hold a hearing despite the withdrawal of the initiating objectors. The example suggests the need for an appeal mechanism, external to government, to ensure procedural fairness where the adequacy of proposed regulations is contested.

64. Canada Gazette. Part I. Vol. 111, February 26, 1977 at page 977.
65. Environment Canada. News Release. "Proposed Initial Regulation on PCB Published." April 1977, Ottawa.
66. Notice of Objection filed by Richard Phaneuf, National Indian Brotherhood, Ottawa to the Honourable Romeo LeBlanc, Minister of Fisheries and Environment, Ottawa, April 12, 1977.
67. Correspondence from Noel V. Starblanket, president, National Indian Brotherhood, Ottawa to Hon. Romeo LeBlanc, Minister of Fisheries and Environment, Ottawa, July 18, 1977.
68. Canada Gazette. Part II. Vol. 111, September 28, 1977 at page 4228 states that "no notice of objection was filed with the Minister."
69. Correspondence from the Hon. Len Marchand, Minister of State, Environment Canada, Ottawa to Noel V. StarBlanket, NIB, Ottawa, October 25, 1977.
70. Notice of Objection filed by Iron Ore Company of Canada, Labrador City, Nfld. to the Hon. Len Marchand, Minister of State, Environment Canada, Ottawa, January 31, 1979.
71. Notice of Objection filed by Eurocan Pulp and Paper Company of Kitimat, B.C., to the Hon. Len Marchand, Minister of State, Environment Canada, Ottawa, January 24, 1979.
72. Canada Gazette. Part I. Vol. 112, December 2, 1978 at page 7117.
73. Environment Canada and National Health and Welfare. Joint News Release. "First Challenge to Environmental Contaminants Act to be Investigated by Board of Review." October 9, 1979. Ottawa.
74. Canada Gazette. Part I. Vol. 113, October 6, 1979 at page 6286.
75. "Objections made by two companies to PCB restrictions, "The Globe and Mail, October 10, 1979.
76. Environment Canada. Bulletin. November 21, 1979. Ottawa.

J.F. McCracken EXECUTIVE DIRECTOR  
DIRECTEUR - EXÉCUTIF

03129

# Canadian Lumbermen's Association / l'Association Canadienne de l'Industrie du Bois

27 Goulburn Avenue, Ottawa, Ontario, Canada, K1N 8G7

Tel. (613) 233-6205

April 15, 1980.

APR 16 1980

To	Thompson
ENVIRONNEMENT CANADA	AMINANTS
100-17-9	
DATE	16-11-80
File Number	4400 15/10/80

Dr. H. Thompson,  
Executive Secretary,  
FCB Board of Review,  
Environment Canada,  
14th Floor, Place Vincent Massey,  
351 St. Joseph Blvd.,  
Ottawa, Ontario.  
K1A 1C8

Dear Dr. Thompson:

We circulated Dr. M. Cohen's March 5th enquiry to a number of our principals, and all replies expressed appreciation that CLA views were being sought. Some expressed a negative reaction to the short period for a reply and were unable to reply within the time frame. Some of our members are also members of the Canadian Pulp and Paper Association and realized they were being asked by their two associations to respond to Dr. Cohen's enquiry. They proposed we support the CPPA response rather than you receiving two similar replies.

A few respondents were overwhelmed by the legal intensity of the exercise and simply gave up any thought of being able to contribute a positive reply.

Members of the CLA Executive received copies of the reply you received from the Council of Forest Industries of British Columbia, dated March 27th and endorsed the points raised in the draft they sent you.

It would appear, therefore, in order to have the record reflect the CLA is satisfied the representations made by COFI and CPPA represents views which are in harmony with our representative members polled and that you can consider our position consistent with the replies of these two organizations.

J.F. McCracken,  
Executive Director.  
JFM/pc

cc: CLA Executive.



# Syndicat Canadien des Travailleurs du Papier CTC Canadian Paperworkers Union CLC

Suite 1501, 1155 ouest, rue Sherbrooke, Montréal, Qué. H3A 2N3 (514) 842-8931

Louis H. Lorrain  
PRÉSIDENT  
PRESIDENT

MAR 19 1980  
*pb*

02921

March 12, 1980

Mr. Maxwell Cohen, Q.C.  
Chairman, PCB Board of Review  
c/o Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th Floor, Place Vincent Massey  
Ottawa, Ontario  
K1A 1C8

To	Dr. Hazen Thompson
EN	ENVIRONMENTAL CANADA
DATE	18-3-80
FILE	4402-18/P15-20

Dear Mr. Cohen:

Your letter of March 5, 1980, concerning a wide range of questions relating to Boards of Review, will probably require a lengthy reply. I shall try to deal, seriatim, with the questions you pose.

(1) I assume that the primary function of the referral was to "review the soundness of a proposed regulation". However, the establishment of a Board, and its request for submissions by interested parties, implicitly includes (1)(c) although, objectively, the Department could make any necessary technical evaluations. If this function were left to the Department, with provision for input from interested parties, I believe that the public interest would be served. The Department would be equally capable of writing back and noting that the impact of PCB on workers was not within its terms of reference!

(2) This follows from my last comment. I am aware that it might be inadvisable to have a completely unrestrained enquiry into the impact of toxic elements when considering a rather narrow aspect of regulation of their use, however the public interest might be better served by broadening the context in which such narrow enquiry is conducted in order to demonstrate wider potential dangers. (E.g.: The validity of a restrictive regulation on a toxic chemical would



be enhanced, in the public mind, if its potential effects on users were explored.)

(3) Poses a difficult problem. If one has an intelligent and competent Board, one has to assume that they are capable, and would be negligent if they did otherwise, of evaluating proposals flowing from the hearings. It would be ludicrous to be restrained by narrow terms of reference from considering a major factor raised during a Board Inquiry merely because some drafter of terms of reference had not been able to anticipate it. Having said all that, I am not unaware of the possibility of demands for "repetitious public hearings" in order to respond to a new 'major factor'.

(4) I assume that the answer to (a) is in the "eye of the beholder" and, as far as (b) is concerned, I assume that the Minister's 'political' judgment would guide him.

If the safeguards of an appeal (not necessarily to a Board) were in place, I think that (c) would be acceptable and any legitimate interest (the "eye of the beholder", again) would cover (d).

Most of the "important areas of toxics and contaminants" would be subjectively evaluated by groups with specific interests. For example, I believe that if there are questions about the work hazards of such substances a Board or other body should consider them. An employer, viewing the matter on the basis of industrial economy or efficiency, might object. I would not be concerned about limits or penalties related to the withdrawal of objections in (e) unless they were completely frivolous and a blatant method of delaying implementation of a regulation. In that sort of case, I think that extensive publicity might be used as a deterrent.

(5) I assume that the advisory committees would be required to collect relevant background data and viewpoints of interested parties and make them available to any Board.




(6) I believe that the Board should take an inquisitorial approach, with a record of all evidence, assistance to 'public interest' representatives, with the widest interpretation of interested or knowledgeable person", but that hearing procedures should not be hyper-legalistic.

(7) A 'panel' would seem to be a good idea as a basis for Board membership, but with ad hoc additions relating to technical, scientific, legal and 'diplomatic' skills. Some conflict of interest guidelines would, obviously, be desirable.

(8) The mysterious workings of the Treasury Board have always eluded me. An appropriation in the Departmental budget should be devoted to Board expenses, but few people would be likely to know ahead of time whether, in any given year, there would be need for any Board, "two to four", or any other number. The necessary funds should be found for the required number of Boards.

I trust that these observations will be of assistance. They obviously leave many queries unanswered. I should stress that they are my personal comments rather than any considered views of my organization.

Sincerely yours

  
L.H. Lorrain

LHL/CAS/clb

Canadian  
Pulp and Paper  
Association

2300 Sun Life Building  
Montreal, Que., Canada H3B 2X9  
Tel. (514) 866-6621 Telex 055-60690

environmental, energy  
and supply services

l'Association Canadienne  
des Producteurs  
de Pâtes et Papiers

2300 Immeuble Sun Life  
Montréal, Qué., Canada H3B 2X9  
Tél. (514) 866-6621 Télex 055-60690

service de l'environnement,  
l'énergie et l'approvisionnement

03221



HS

To	Thompson
ENVIRONMENTAL CONTAMINANTS CONTROL BRANCH	
DATE 29-04-80	
File Number	4402-78/17520

April 23, 1980

Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th Floor  
Place Vincent Massey  
351 St. Joseph Blvd.  
Ottawa, Ontario  
K1A 1C8

Dear Dr. Thompson:

This is in reply to the letter and questionnaire sent by Maxwell Cohen, Q.C., Chairman of the PCB Board of Review concerning future Boards of Review.

While Mr. Cohen did not specifically ask it, we believe the most important question is whether or not boards of review are really necessary.

In our view, the two Ministers who are responsible and accountable for regulations under the Environmental Contaminants Act are each provided with full support including legal, technical and administrative expertise to assist in the development of regulations. Any additional regulatory development activities, such as, the boards of review therefore duplicate the functions of these departments.

The Environmental Contaminants Act provides for a significant degree of data collection, consultation and investigation. The Act further provides for publication of any proposed regulations in the Canada Gazette and for public input to the Ministers and their departments regarding such draft regulation. If any issues arise out of this consultation with the public, the Ministers and their staff have the capability of initiating further studies as necessary and of resolving any conflicts.

Substitution of a board of review for the government departments brings a parallel bureaucracy into play with the same role as that of the governmental departments, namely, that of preparing recommendations concerning regulations for the Ministers.

We believe that the Ministers and their government departments have all of the necessary resources at hand to arrive at balanced rational regulatory decisions in the public interest without having to resort to the use of boards of review.

Dr. Hazen Thompson

April 23, 1980

We have to conclude that the boards of review can only duplicate the role of government departments and will result in a wastage of public funds and human resources.

We therefore recommend that the Environmental Contaminants Act be amended to delete the provisions for boards of review.

Yours truly,

A handwritten signature in dark ink, appearing to read 'M.J. Frost', with a long horizontal flourish extending to the right.

M.J. Frost  
Manager  
Environmental Council

MJF:tg



Council of  
Forest Industries  
of British Columbia

COFI File: 8.1.1.1

April 25, 1980

Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th Floor, Place Vincent Massey  
Ottawa, Ontario  
K1A 1C8

To	Dr. Thompson
ENVIRONMENTAL CONTAMINANTS CONTROL BRANCH	
DATE 5-05-80	
File Number	4402-78/175-20

03281

Dear Sir:

Re: Boards of Review under the Environmental Contaminants Act

With regard to the above and Mr. M. Cohen's letter to Mr. R.A. Shebbeare of COFI on March 5th, we would first of all like to thank the Board for the opportunity to comment as requested "on the better organization and functioning of Boards of Review in future".

Our environmental committees have now had an opportunity to review Mr. Cohen's request, but rather than respond to the specific questions asked, we feel it more appropriate at this time to offer a few general comments on the subject.

The Environmental Contaminants Act (Section 6 (1)) instructs the Ministers of the Environment and Health and Welfare to establish an Environmental Contaminants Board of Review upon their (the Ministers') receipt of a notice of objection to proposed regulations under the Act.

We feel therefore that answers to the questions posed by Mr. Cohen must be sought from the Ministers responsible for establishment of the Board.

In fact, as the objection mechanism is through the Minister initially, and the Ministers are empowered to appoint Advisory Committees to review data and receive representations, some of our members question the need for Boards of Review and wonder if, through existing legislation, the Minister can deal with objections through these Advisory Committees, and thus reduce costs and avoid duplication of effort.

As you may see from the enclosed copy of a letter to the Minister of the Environment, we are concerned about condemnation of industrial substances without benefit of reliable scientific evidence as to environmental effects.


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- 2 -

We are therefore appreciative of opportunities to provide technical advice to elected officials in their process of developing legislation, and trust that early communication of proposed regulations, Review Boards and any proposed legislation can be given us.

Yours very truly,

COUNCIL OF FOREST INDUSTRIES

*for* 

D. Loyd  
Chairman  
Directors Environmental Committee

DL/mt

Encl.





Council of  
Forest Industries  
of British Columbia

COFI File 8.1.1.1

April 25, 1980

Hon. John Roberts, MP  
Minister of State for Science and Technology  
and Minister of Environment  
Ottawa, Ontario

Dear Mr. Minister:

This is written on behalf of the forest industry in British Columbia, which, as you are probably aware, is the most important industry in the province, providing direct employment to many thousands of citizens with spin-off benefits and indirect employment in services, transportation, equipment manufacture, and in many other areas of our economy. In fact, the forest industry is the sole means of sustenance for many B.C. communities situated along coastal waterways, as well as for many fairly large B.C. interior towns.

The Council of Forest Industries of B.C. (COFI) is an organization supported by the industry to represent them in matters pertaining to all facets of the industry including forest management, economics, environmental affairs, wood products, transportation, occupational safety and health, and government and public affairs.

Through COFI, the industry was recently invited to comment on the future structure and function of Environmental Contaminants Board of Review which the Ministers are required to establish under section 6 of the Environmental Contaminants Act, if a notice of objection to proposed regulations is filed with the Minister. We felt that many of the questions asked by Mr. Cohen, Chairman of the first Board of Review, were properly subject to ministerial discretion, and therefore did not respond directly to the questions asked (see letter attached). However, we sincerely believe that all persons and organizations likely to be affected by proposed regulations, Boards of Review, and subsequent legislation should be given the opportunity to be heard at an early stage in the proceedings. To that end, we respectfully request that we be given early notice (pre-Gazette) of proposed regulations which could affect our industry practices. We believe this request to be reasonable since we represent the largest single commercial economic sector in B.C., and it does take time to reach consensus.

There is a tendency in our society at present for the blanket condemnation of certain substances used by industrial organizations, without sound

../2

scientific data as backup, and without examining the consequences of prohibiting the use of such substances.

For example, where a community is dependent on a single industry for support, there must be benefit analysis of the trade-offs between prohibiting the use of a substance which the industry requires to stay in business, and the economic, physical and social well-being of the community dependent on that industry.

For that reason and others we welcome the opportunity to provide both technical and socic-economic input to advisory Baords which the minister may appoint.

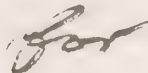
One further point we would make at this time is connected with jurisdiction and enforcement of regulations. We realize, of course, that the Federal Government has claimed jurisdiction over contamination of coastal waterways and salmon streams, but we would urge that, where possible, provincial regulatory bodies be given authority to administer Federal regulations.

This is the intended practice involving the Pollution Control Branch of B.C. under the terms of the proposed B.C. - Federal Accord on chemicals and pollutants. We strongly favour that arrangement because then we have only one agency to deal with in those matters for which Accord has been reached.

In order to avoid costly duplication of effort and frustrating conflicts in jurisdiction, we in industry in B.C. are on record as preferring to deal through one regulatory agency to meet the requirements of all levels of government and their agencies.

Yours very truly,

COUNCIL OF FOREST INDUSTRIES



Don Loyd  
Chairman  
Directors' Environmental Committee

cc. Hon. Monique Begin, PC, BA, MA.  
Minister of National Health and Welfare

Hon. S. Rogers, B.C. Minister of Environment

W. Hazen Thompson  
Executive Secretary  
PCB Board of Review

DL/sa

## FRIENDS OF THE EARTH / LES AMIS DE LA TERRE

P.O. BOX 569, STATION B, OTTAWA, CANADA K1P 5P7

(613) 231-2742

03337

May 7, 1980

Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th Floor, Place Vincent Massey  
351 St. Joseph Blvd.  
Ottawa, Ont. K1A 1C8

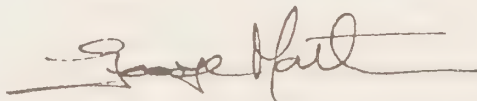
Dear Dr. Thompson,

Thank you for offering Friends of the Earth the opportunity to comment on the operations and procedures for future Boards of Review. You will have received replies from a number of our member organizations and associates; in recognition of this fact and because the issues raised are not a current program priority for Friends of the Earth, we will not be commenting in detail at this time. This should not be construed to reflect a lack of interest on our part. Indeed, our membership will shortly be evaluating a proposal for a program initiative in toxic chemicals.

Notwithstanding the above, I would like to comment on your question 4D. It is our strong contention that the phrase "having an interest therein" when applied to prospective objectors, must be interpreted broadly. Pecuniary interests are but one element in the spectrum of affected interests. It is our contention that when the public as a whole is affected or potentially affected by a regulation, members of that public clearly have an "interest" in the regulation.

Again, thank you for the opportunity to comment. I have no doubt that as further experience is gained under the Environmental Contaminants Act, and as our organization develops further expertise as a result of proposed programs in the toxics field, we will have further comments to offer.

Yours truly,



George Matheson  
Coordinator

/ab

# The Mining Association of Canada

**Executive Offices**

Suite 705, 350 Sparks Street, Ottawa, Ontario K1R 7S8

Tel: (613)233-9391

Telex 053-3732

03141

**Administration**

Suite 409, 36 Toronto Street, Toronto, Ontario M5C 2C2

Tel: (416) 363-8019

Telex 06-219827

Ottawa

April 15, 1980

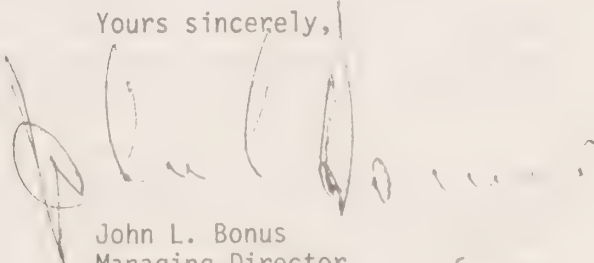
Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th Floor, Place Vincent Massey  
351 St. Joseph Blvd.  
Ottawa, Ontario K1A 1C8

Dear Sir:

Further to Mr. Maxwell Cohen's letters to me dated March 5th and 7th last with regard to the questionnaire concerning Boards of Review established under the Environmental Contaminants Act, I am advised by our Environmental Committee that the Ontario Mining Association is also responding to a similar request you have addressed to them. Many members of their environment group also serve on our own Environmental Committee and consequently the comments you will be receiving from the OMA are acceptable also to the MAC.

I would add that in our view it is essential that Boards of Review include members competent in the relative basic sciences, that they also be knowledgeable in the industrial world, and have a broad perception of social responsibility.

Yours sincerely,

  
John L. Bonus  
Managing Director

JLB:gh

cc: Dr. R. D. Lord



02905  
ENVIRONMENTAL CONTAMINANTS ACT

PCB BOARD OF REVIEW

To	Dr. Thompson
ENVIRONMENTAL CONTAMINANTS CONTROL BRANCH	
DATE 14-3-80	
File Number	4402-28/P75-20

March 5, 1980

FILED 17 1980

Mr. John Koselek  
Assistant General Manager  
Nordfibre Company  
Box 3100  
North Bay, Ontario  
P1B 8K7

*COPIES MADE  
FOR OUR FILE*

Dear Mr. Koselek:

Re: Boards of Review under the  
Environmental Contaminants Act

The Environmental Contaminants Act requires that Boards of Review be established in certain circumstances (Section 6). A copy of the Act is enclosed for your convenience.

On November 1, 1979 the first Board of Review was established under this legislation as the result of proposals by the Minister of the Environment to amend Chlorobiphenyl Regulations No. 1. Messrs. L.F. Marwood, P. Eng., and R.B. Sutherland, M.D., were appointed as Members of the PCB Board and I was appointed as Chairman. We are in the process of completing our report in this area.

However, the establishment and operation of this first Board has raised a number of questions as to the manner in which such Boards should function in future. We have been invited by the Government, in light of our "unique" experience, as the first Board, to report as well on the better organization and functioning of Boards of Review in future.

We propose to respond to this invitation by way of a Second Report. However, before doing so, we are anxious to receive the comments and suggestions of representatives of government, and the public interest, generally. We are writing to you in the hope that you will be in a position to assist us by letting us have the benefit of your experience and insights in relation to this subject.

In order to provide a framework for representations, we have developed a list of questions which raise the issues with which we expect to deal. We would welcome, very much, your frank comments in relation to all or any of these matters or, indeed, any other related issues which you see as being relevant to our task.

.../2



- 2 -

The questions are as follows:

(1) What was sought to be achieved by establishing the Board of Review process in the Environmental Contaminants Act?

(a) Was it to provide the Department (Environment Canada) with an evaluation of a proposed regulation as well as with an impartial assessment of its general policy in dealing with the substance in question? Section 6(1) requires that "the proposed order and regulations or the proposed regulations" be referred to the Board, suggesting that the process is essentially to review the soundness of a proposed regulation to which objection has been made. This is also suggested by the nature and scope of the representations by the Department before this Board, including the reference to us of proposed revisions to the proposed chlorobiphenyl regulations.

(b) Was it merely to determine the "nature and extent of the danger posed by the substance" as suggested by Section 6(2)? If so, is the Department not as capable (or more capable) of making such a determination by drawing upon its available expertise or should this be subject to some review process in the public interest?

(c) Was it to provide an impartial forum for industry and "public interest" groups to make representations so that the Minister could not be accused of being insensitive to these representations (unless he were to act contrary to the recommendations in the report of a Board)?

(d) Are all of the above implicit in the Act? Are there other possible objectives?

(2) Quite apart from the original purpose in establishing the Board of Review process, what scope of review would be most beneficial to the public interest, having in mind the objective of controlling or eliminating toxic elements?

(3) What procedure should be adopted to deal with last-minute changes in proposed regulations which have already been referred to a Board of Inquiry, such as the following:

(a) Proposals by witnesses at public hearings regarded as acceptable by the Board?

(b) Proposals by the Board, itself, in consequence of the hearings?

(c) Proposals by the Government in consequence of the hearing?

(Note - The interest here is in avoiding the need for repetitious public hearings without diminishing the right to be heard in relation to both material and non-material proposed changes.)

.../3

- 3 -

(4) (a) What is a valid "notice of objection" under Section 5(3) of the Act?

(b) What procedure does the Department have for making a determination as to whether or not a "notice of objection" is valid under the Act and, if a formal procedure does not exist, what procedures should be established?

(c) What criteria and procedures might be established to determine the preliminary issues of whether the objection is "frivolous" or, generally, what should be regarded as a valid notice of objection?

✓ i) Would it undermine public confidence in the impartiality of the process if this were done internally by the Department? NO

ii) Would an appeal to an appropriate body eliminate such concerns? - NOT NECESSARY

✓ iii) Should a Board be constituted in every case where there is a purported notice of objection, leaving it to the Board to decide upon the validity of the notice of objection before proceeding? NOT NECESSARY

✓ (d) What is the significance of the condition in Section 5(3) that an objector must be a person "having an interest therein"? Pecuniary? Other? What is appropriate? ANY LEGITIMATE INTEREST

✓ (e) (i) Should procedures be established for the withdrawal of a notice of objection and should limits or penalties be imposed in relation to withdrawals? NO

(ii) Assuming that preliminary criteria of "interest" and substance (i.e. not "frivolous") have been met, should the withdrawal of all notices of objection result automatically in the termination of an inquiry without any substantial report? On the other hand, if a basis for a substantial objection does exist in fact, what is the relevance of the withdrawal of a notice of objection? YES.

(iii) Is there a sound reason in public policy for a Board to be established in every case where important areas of toxics and contaminants are involved, whether a valid notice of objection has been filed or not? How could this be limited to important areas? CERTAINLY NOT IN EVERY CASE. DEPENDS ON THE DEGREE OF POSSIBLE HARM.

(5) Given the language of Section 3(4), how do you conceive the role of joint advisory committees and how might the work of such committees relate to that of Boards of Review? COMMITTEES SHOULD RECOMMEND TO THE MINISTER WHAT ACTION SHOULD BE TAKEN. ADVISE ONLY.

(6) What procedures should be followed by a Board in the course of its inquiry considering its powers, which correspond to those of a Commissioner under The Inquiries Act?

Same As Under Inquiries Act.

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- 4 -

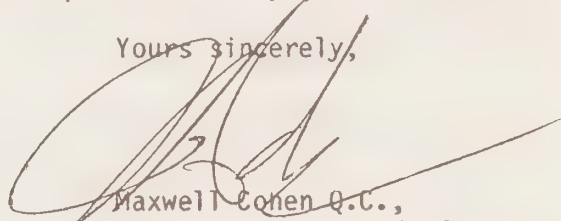
- (a) Should a Board take initiatives in acquiring evidence by taking an "inquisitorial" approach and, for example, commission scientific studies and/or experiments in some cases, seek out its own expert witnesses and retain its own counsel?
- (b) Or should it play a more passive role, simply receiving whatever evidence and representations might be presented?
- ✓ (c) Where there are parties with opposing viewpoints, should a strict adversarial approach be adopted at public hearings with restrictions as to "standing," opportunities for cross-examination by the parties, etc.?
- ✓ (d) Should all evidence be received at public hearings and be made available to interested parties and should there always be a formal transcript of the proceedings? Or is not a format of informal bilateral interview with interested parties or government desirable? INFORMAL FORMAT IS DESIRABLE.
- (e) What form of notice of the Board's inquiry and of any public hearings, would be appropriate?
- ✓ (f) Should funds be made available for "public interest" representation through payment of expenses, in part, or otherwise? YES.
- (g) Should records be kept of the executive sessions (when the Board sits in private) of a Board? YES.
- (h) How broadly should the concept of "interested or knowledgeable person" in Section 6(2) be interpreted? BROAD INTERPRETATION
- ✓ (7) (a) Who should be appointed as members of Boards of Review i.e. what type of expertise, experience and stature are appropriate for each of the Board members? What combination of backgrounds is desirable on a particular Board? TECHNICAL AND JOB RELATED BACKGROUNDS
- ✓ (b) Should some form of "conflict of interest" guidelines be established or adopted for Board members? YES
- ✓ (c) Should some form of consultative process (formal? informal?) be established to advise the Minister in relation to specific appointments or in establishing a "panel" from which to draw? YES, Informal
- (8) What administrative machinery should be established to provide financial and administrative support for Boards of Inquiry? Would the perceived impartiality of Boards be affected if such funding or services were provided through existing Departmental resources? Is it possible to devise logistical arrangements from Departmental resources that are perceived as independent and are so in fact, which will service approximately two to four Boards per year? YES.

We would appreciate receiving your written response prior to March 31st. You may write to us at the following address:

Dr. Hazen Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th Floor, Place Vincent Massey  
Ottawa, Ontario  
K1A 1C8

Thank you for considering our request and for your assistance.

Yours sincerely,



Maxwell Cohen Q.C.,  
Chairman, PCB Board of Review

P.S. The PCB Board of Review's First Report dealing with the amendments to Chlorobiphenyl Regulations No. 1 and related policy matters is expected to be released for distribution on or before March 25, and a copy will be sent to you.





03468

## TRENT UNIVERSITY PETERBOROUGH ONTARIO CANADA

K9J 7B8

Environmental and Resource Studies Program

May 26, 1980

To	T. Cohen
ENVIRONMENTAL CONTAMINANTS CONTROL BRANCH	
DATE 22-5-80	
File Number	4002-72/15

Maxwell Cohen, Q.C.  
Chairman  
PCB Board of Review  
Environment Canada  
Ottawa, Ontario

Dear Mr. Cohen:

Thank you very much for the opportunity to comment on the Environmental Contaminants Act Board of Review Procedures. I regret that I was not able to follow the PCB Review more closely. My interest in this matter is two-fold: (1) I research and write on the subject of occupational and environmental health policy and (2) I have an interest in the subject of public participation structures and processes dating back to my Ph.D. thesis (Political Science, U.B.C., 1975). I found the set of questions fascinating, but regret the press of other commitments forces hasty comment. I hope my remarks are of some help in any case.

- (1) I cannot of course comment on DOE intent though I knew Richard Davies (DOE) when he worked extensively on drafting the act. I would, however, make two more general comments here.

I believe it is most useful to open the process of setting regulations to public view at one or more points in the process. Legislation of this sort, obviously, is worthless without prompt and firm regulation. I do not believe (1(b)) that "expertise" in these matters can be utterly "objective"--setting contaminants regulations is, inevitably, a political, value-laden, process. There is rarely a harm no harm threshold which can be demonstrated with certainty. Few carcinogens, for example, have thresholds below which there is no effect to some "statistical" minority however small.

Second, with regard to your 1(c) there are surprisingly few permanent "public interest" groups of an advocacy nature in Canada which focus their attention on environmental contaminants. Few have the resources to monitor



-2-

and participate in such an ongoing process. I believe it urgent that there be more such groups or that interest groups of a more general nature focus more of their attention to the issue of toxic substances in the environment.

- (2) I would suggest that there be some opportunity for greater "public interest" initiative in these matters. This might come to some extent through section 3(4) of the Act but even this is not sufficient. As the Act stands only the Ministries and industry can initiate either an advisory committee or a Board of Review. It would seem to me in order to allow "public interest" groups to initiate an inquiry regarding substances for which regulations are not proposed. Obviously such a process would need limits--one way to "control" input might be to have an Annual or Biannual Board of Review struck to hear assertions regarding omissions. My expectation would be that few citizens or groups would avail themselves of this sort of opportunity. Nevertheless it seems to me a matter of equity that if industry can object to regulation, there should also be an opportunity to object to non-regulation.
- (3) I have no strong opinions here. I assume the decision rests with the government and that the Board can recommend revisions on whatever basis it chooses (3(a) or 3(b)). I would think the Board could rule as to whether or not government changes were material or non-material. Only material changes would constitute a need to extend an inquiry, giving earlier witnesses the opportunity to comment again (perhaps in writing if this would save expense).
- (4) 4(d) is crucial here. It is crucial to the integrity of the process that "interest" not be taken to mean "pecuniary interest". The crucial problem with any such issue is to locate those willing to act for non-pecuniary reasons with anything like the attentiveness, assertiveness, and thoroughness of those with a pecuniary interest in the matter.

I am trying to develop of late a distinction between "equity" political issues and "technology" issues which seeks to explain many dimensions of contemporary politics based on a related proposition. Allow me to make it here in a sentence. In the past 20 years we have seen more fundamental political controversies arise without both "sides" having a pecuniary stake. Our political institutions (parties, parliament, and so forth) were formed in an earlier era. To be brief, we must learn how to structure "public interest" (non-pecuniary) participation if we are to remain thoroughly democratic. This is one such opportunity.

-3-

I would be hesitant to see objections dismissed as frivolous solely within the Department. But some simple extra-department mechanism could be devised I would think.

- (5) Joint advisory committees operate far earlier in the regulatory process and have a somewhat more general scope. Boards of Review operate after a new regulation is issued and some objection is made. Perhaps the advisory committee could be on-going. This would allow for the sort of function I mentioned in response to question 2. Such an on-going committee would hopefully not need to meet often and could function primarily through sub-committees on particular substances with co-opted experts from within and/or outside the Ministry. I do not believe that this sort of structure would need to be more elaborate than the structure called for in 3(4).

If the joint advisory committees included both industry and public interest representatives and this process worked Boards of Review would not be frequently needed.

- (6) (a) Lawyers, of course, are expensive. One can get a legion of "public interest" defenders for the cost of one retained counsel. One might get two or three articulate and competent "public interest" defenders for the price. I couldn't come to a conclusion on this point without having participated directly in the process over an extended period.

(a) and (b) I do believe that the Board should take an active role. It should seek non-industry expertise. One has to assume industry will be there if it has an interest to defend.

(e) Perhaps small advertisements in a small number of regular and selected list of academic and environmentalist publications. Regional public advertising might be appropriate in some cases.

(f) ABSOLUTELY. I simply would not expect that many individuals or groups could participate otherwise. This needs an extensive study with regard to this and other DOE legislation. I have enclosed comments I have made elsewhere on this matter. It is perhaps the single most important question you raise.

(h) Rachel Carson had only an M.Sc., I believe.

...4

-4-

- (7) I am impressed with the composition of the first Board. It seems well balanced and members are appropriate. "Conflict of interest" guidelines would be useful if there were to be a need for many Boards.

I hope this is helpful. If any points need clarification, please call.

Best regards.



Robert C. Paehlke  
Associate Professor  
Political Studies

encls.

Attachments submitted to the Board:

1. Paehlke, Robert. Guilty until proven innocent. Carcinogens in the environment. Nature Canada, April/June: 18-19, 22-23, 1980.
2. Paehlke, R.C. Some impressions of three environmental inquiries. Alternatives, Winter: 46-51. 1978.



To explore, enjoy and preserve the country's forests, waters, wildlife and wilderness.

536A Yates Street  
Victoria, British Columbia  
V8W 1K8

25 April 1980

Dr. Hazel Thompson  
Executive Secretary  
PCB Board of Review  
Environment Canada  
14th Floor  
Place Vincent Massey  
351 St. Joseph Blvd  
Ottawa, Ontario K1A 1C8

1 MAY 05 1980  
HAT  
PP

T8	H. Thompson
ENVIRONMENTAL CONTAMINANTS CONTROL ACT	
DATE 5-05-80	
4402-78/P15-20	

Dear Dr. Thompson:

Subject: PCB Board of Review

03224

Our thanks for providing an opportunity to comment on possible operations and procedures for future Boards of Review.

Before directing our comments to the Questionnaire, let me say it is our view that there is a need to improve the communication of ongoing work of the Department of Environment to public interest groups. For example, in our situation we maintain a regional conservation office here in Victoria (address above) which serves as a clearing house for public inquiries on a broad range of environment related topics. It would seem the benefits to the general public and the Department of Environment from improved ongoing communication are obvious.

#### Answers to questionnaire

##### Question #1

There needs to be provision for convening a Board of Review, upon petition to the Minister, for contaminants which a person(s) believes to require regulation under provisions of the Environmental Contaminants Act.

(d) We believe all the above are implicit in the Act.

##### Question #2

The Board of Review terms-of-reference should provide opportunity to explore the "need" for the use of particular contaminants and possible alternatives to satisfy the "need".

There should be scope for investigation and recommendations of preventative measures by which related contaminant situations can be avoided in the future.

##### Question #3

No comment.

##### Question #4

The answers under this section must relate to the need for A National Council on Environmental Quality. The scope of such a Council should be similar, or better; to the President's Council on Environmental Quality in the United States.



-2-


It is our view that Boards of Review, while requiring a broader mandate, will no doubt continue to serve a restricted role.

- - - - -  
It is our conclusion that the public interest in this matter is best served by creation of an Environmental Quality Council. The questions posed in your questionnaire cannot be properly addressed without reference to a National Council on Environmental Quality.

The word Advisory and the historical implications of an advisory council cannot be supported. An Environmental Quality Council must have broader independence.

The Sierra Club of Western Canada would welcome the opportunity to discuss the creation of a National Council on Environmental Quality.

Yours truly,



Robert W. Nixon



APPENDIX G

Correspondence between the Board and  
the Deputy Minister, Environment Canada,  
Concerning the Socio-Economic Impact  
Analysis Process.



ENVIRONMENTAL CONTAMINANTS ACTPCB BOARD OF REVIEW

1302 - 200 Rideau Terrace  
Ottawa, Ontario  
K1M 0Z3

Mr. J.B. Seaborn  
Deputy Minister  
Environment Canada  
14th Floor  
Fontaine Building  
Ottawa, Ontario  
K1A 0H3

May 8, 1980

Dear Mr. Seaborn:

Re: Second Report of the PCB Board of Review

While I hesitate to impose any further information-gathering burdens on you and your officials you may recall that in the two letters addressed to you of April 15th and April 22nd dealing with environmental assessment procedures in the first case and with the step by step process for the formulation of regulations in the second case, both queries unfortunately omitted to ask how your department applies the socio-economic impact analysis (SEIA) required by the Treasury Board and government policy (see Treasury Board Administrative Policy Manual Chapter 490).

The PCB Board of Review is necessarily concerned with understanding fully how far each regulation (e.g. PCBs) under the Environmental Contaminants Act will have had a full SEIA study. The Board therefore would appreciate having the details as they were applied to the PCB Regulation and amendments set out in a memorandum for the Board's needs.

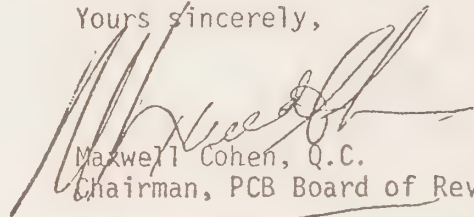
It is quite clear to the Board that future Boards of Review should be aware of the scope of the SEIA already made by the department before giving birth to a proposed regulation. Unless this process is clearly understood, Boards of Review might be tempted to explore these aspects as a part of their duties, particularly when pressed by public interest groups, and even more so by industry, to do so. Since the homework may already have been done by the department there is no reason why a Board of Review should not have such information before it and thus forestall needless fresh inquiries in this area. Would you therefore be kind enough to inform the Board how the SEIA studies are made using as an example the PCB Regulation as amended.

.../2

- 2 -

I look forward to receiving an outline of the procedures followed and the substantive results achieved so that the Board may incorporate this information into its reflections in the Second Report wherever these SEIA questions become relevant to its conclusions.

Yours sincerely,



Maxwell Cohen, Q.C.  
Chairman, PCB Board of Review

c.c. R.M. Robinson



Ottawa, Ontario  
K1A 0H3

June 13, 1980

Professor Maxwell Cohen, Q.C.  
Chairman  
PCB Board of Review  
1302 - 200 Rideau Terrace  
Ottawa, Ontario  
K1M 0Z3

Dear Professor Cohen:

Thank you for your letter of May 8 enquiring about the application of the Socio-Economic Impact Analysis (SEIA) policy to the PCB regulation before the Board of Review.

Briefly, the SEIA policy became effective August 1, 1978, after the scientific and technical assessment of the proposed PCB regulation was largely complete. Consequently, a full SEIA review, as it is now established, was not undertaken during the development of the regulation. Preliminary SEIA guidelines had however been issued to the Departments; these guidelines have now been superseded by the Treasury Board Policy of December 1979, which has already been provided to the Board of Review. Under the preliminary guidelines, more latitude was given to departments on the basic process aspects of the implementation, provided the essential purposes of the SEIA were met. The PCB regulation thus was developed in the "spirit" of SEIA.

The purposes of SEIA are described in detail in the December 1979 Policy. The essence of the policy is to provide a systematic a priori analysis of possible impacts of Health, Safety or Fairness (HSF) Regulations. This category includes

.../2



environmental protection regulations. The emphasis is on improved allocation of resources augmented by a number of other impacts available to decision-makers. In addition, the policy is foreseen as an opportunity for increased public participation in regulation-making, by ensuring that SEIA reports are available for comment upon request by interested parties. In the case of the PCB regulation the Contaminants Control Branch, as the scientific and technical authority, spearheaded the identification of health and environmental effects of the regulation and collected its industry costs, and assessed the feasibility of implementation. A seminar was held involving knowledgeable members of the Canadian Standards Association and the Factory Mutual Insurance Company. The proceedings were published in the Dillon Report of May 1978. Since health and environmental effects were not being challenged by industry, however, no public consultation was sought.

It is not possible to have one single step-by-step approach, both in regulation-making and in the application of SEIA policy, because of legislative differences of the laws assigned to the Minister of the Environment. We are, however, testing a process which provides a guide to identifying, assessing and prioritizing candidate environmental problems. Essentially, we are attempting to link the scientific and technical aspects of regulation-making, the perspective of socio-economic factors and policy options.

When the SEIA policy was first introduced, a Socio-Economic Programs Division was formed and assigned responsibility for the socio-economic analytical and administrative aspects of implementing the SEIA policy. The Division works closely with the technical and scientific authorities to ensure that there is an appreciation for the need to determine at the outset the possible measures that may be applicable. The Division reports to the Director General of the Policy, Planning and Assessment Directorate, who in turn reports to the Assistant Deputy Minister of EPS. This arrangement provides for two functional perspectives on a problem.

There is frequent misunderstanding of the distinction between the SEIA policy, and the actual scope of the SEIA report released on a specific regulation and which varies in accordance with the status of the regulation. The Government recognizes that socio-economic impact analysis could be a costly process and entail delays in resolving urgent problems. The policy therefore establishes three classes (ie status) and outlines an approach for each class.

Essentially, a major regulation is defined as one that incurs "costs" (of which the largest part is industry's) of \$10 million or more in any 12-month period. Two other time horizons and cost thresholds that are equivalent to the \$10 million criterion, according to the circumstances, can be applied. A full analysis must be conducted in cases involving major regulations and the complete SEIA report is then made available to all interested parties.

In the case of the PCB regulation, threshold cost estimates appeared to justify a minor status (the second class) for the regulation. The analysis of the discounted costs over a twenty-year period were estimated at \$8.3 million. The analysis also indicated possible cost reductions which would reduce the gross cost. There were, however, insufficient data to quantify these costs. Since the regulation did not fall under the major status it was considered cost inefficient to pursue these savings in a precise manner and the PCB regulation was therefore confirmed as a minor regulation for SEIA purposes.

The third class of regulation is the emergency regulation in which the delay involved to perform a full SEIA is likely, in the Department's view, to incur social costs greater than those which might arise as a result of not doing a full SEIA. In the case of the PCB regulation there was insufficient justification to classify the regulation as an emergency regulation. It should be noted that when an emergency regulation is promulgated, a complete SEIA is undertaken retroactively if the regulation is intended to stay in force for more than two years. For your convenience, I am attaching a chart from the policy manual which shows the appropriate status for any given regulation.

- 4 -

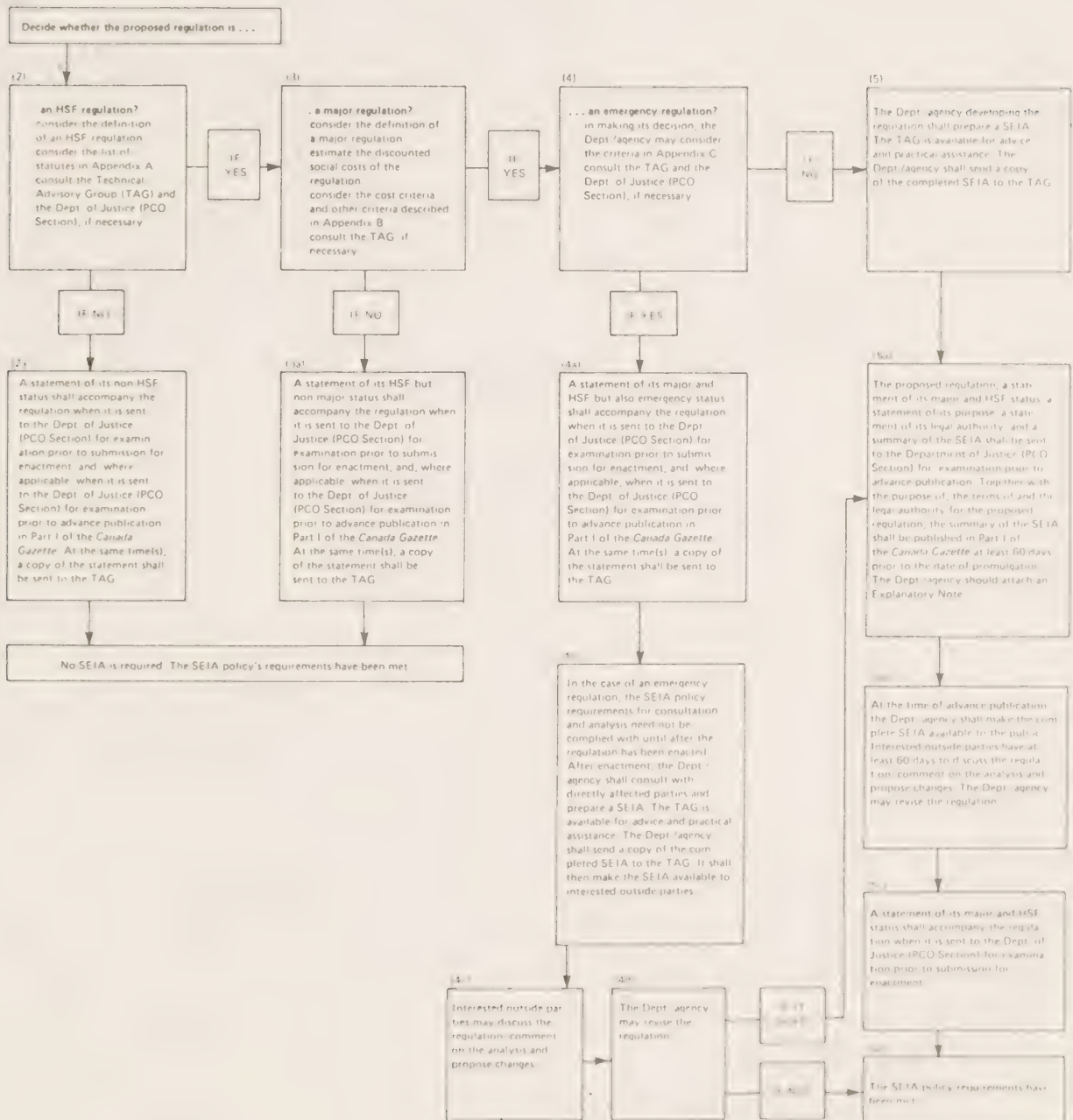
I hope that this will provide you with sufficient information. Should you require further clarification, I would be pleased to have one of my officials respond to any questions on which you have concerns or desire greater elaboration.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "J.B. Seaborn". The signature is written in dark ink and is positioned above the printed name.

J.B. Seaborn

## Steps to be followed under the Socio-Economic Impact Analysis (SEIA) Policy







APPENDIX H

Extract (pp.70-71) from the  
Transcript of March 13, 1980



THE CHAIRMAN: Do you draw Dr. Sutherland's distinction already in the department?

10 MR. ROBINSON: Well in the discussions we have had ourselves -- and Mr. Prahbu can perhaps carry this further if he feels it necessary -- but in the discussions we have had ourselves on the specific question of who an objector might be, which is the bottom line really of your comment, we have recognized a reality and that reality is that over time the courts appear to be interpreting that kind of idea ever more broadly and govern-  
15 ments are too, and rightly so, and it is almost a question of the mores of society and I think if you look at something like the chlorofluorocarbons issue where the contention is that the substance will reduce the ozone and thereby increase ultraviolet rays which will increase the incidence of skin cancer, this is  
20 the sort of sequence of relationships that is described. You could argue that about the only person who couldn't be interested in that would be some recluse that never went outside. Without being too facetious, there is a very real perceived effect which is certainly by any legitimate or any interpretation -- in  
25 fact, if you want to, you could even say it is pecuniary if it

ends you up in the hospital with the associated costs. I mean just to make it a little bizarre. I think it is the recognition of this interrelationship, almost the ecology of status in a sense, the interrelationship between an action by government or a failure to act and the effects on the citizens that has given rise to this ever broader interpretation of the right of the citizen to question what has gone on and therefore to take on the rights that at one time were usually given to people who had to use your term pecuniary interest, or proprietary interest.

APPENDIX I

Extract (pp.76-77) from the  
Transcript of March 13, 1980





MR. ROBINSON: Which takes me really back to I guess (4)(b) because we sort of kicked off our conversation on (4)(a), didn't we? So if I might turn then to (4)(b), what procedure does the department have for making a determination as to whether or not a Notice of Objection is valid under the Act, and if a formal procedure does not exist what procedures should be established. What I am going to do is basically to describe the process that we follow which we have felt among ourselves is a reasonable process, therefore, in a sense I suppose we would say it is adequate in the context of the question, but obviously you may see it as otherwise. So I will simply describe the process in a sort of step-wise form. Some of it is sort of fairly self-evident, but I think it is useful to have it out in a clear fashion. Where we receive a single objection the procedure we would follow and have followed is essentially this: the Notice of Objection comes in normally in the form of a letter to the Minister or Ministers and the officials concerned with the regulation of concern both in H & W and in Environment examine the content of that Notice of Objection. It is then normal that the next step would be for usually Environment, usually the Environmental Protection Service, to consult with the objector to ensure that the proposed order and the objection were understood. In other words, to make clear that we understand the content of the objection, that we see what prompted it and also to be sure that the objector himself understands what he is objecting to. It may sound rather simplistic but it may not surprise you to

know how many objections have vanished into thin air as a consequence of that process, but I would say the great majority. Is that a fair comment, Dr. Brydon? In other words, once you get together and start looking at what that objection was intended to deal with and you start explaining what it is you are trying to do it is remarkable how many of them find that they can be resolved. So that is your first sort of, as it were, step in the process.

APPENDIX J

Extract (pp.89-91) from the  
Transcript of March 13, 1980





MR. ROBINSON: Quite so. Might I make a further comment  
10 here because I really would like to place the -- while we have  
had a little bit of levity over the word "deal", I think we should  
really place that in some perspective. Given the rather pejor-  
ative implication of that word in the context of regulation  
development, I think I should indicate to you and I think cer-  
15 tainly John Monteith's remarks have, in fairness the kind he  
was talking about one really probably would not apply a pejorative  
implication of "deal" to. This is really a common sense recogni-  
tion of some adjustment's being required.

However, we have been faced with pressures for deals  
20 and I am going to give you an example without naming the compan-  
ies, and where we have resisted it but it will show you the kind  
of thing that can happen. In a particular substance that we  
were planning to take action on, a company did in fact file a  
Notice of Objection and really questioning the whole basis for  
25 what we were doing, and it became apparent from some, what you

might call, well, the company called on the Minister at a very senior -- the president came and called on the Minister, or the vice-president where we had a very vigorous discussion. I think I had to restrain one of the scientists at one point and the  
5 company in a very gentle kind of way let it be known that the Notice of Objection would be readily withdrawn if we undertook not to explore other avenues of use of this particular substance. I think you take the point. Needless to say --

10 THE CHAIRMAN: That is known as whitemail if not blackmail.

MR. ROBINSON: Yes, you are right. That is exactly right, they were really using the Board of Review process as a kind of blackmail and they really were not objecting to the regulation at all, they were really objecting -- on the face of it  
15 they were objecting to the whole thing -- but what they really were doing was trying to strike a bargain with us that if we would lay off the other uses for this substance then they would lay off us in terms of imposing on us that most feared of all things, a Board of Review. So that basically was the "deal".

20 Now that would have been a "deal" in the pejorative sense --

THE CHAIRMAN: Yes.

MR. ROBINSON: -- and needless to say we not only did not accept that deal but gave our Minister a letter, a vigorous  
25 letter, in response in which he ignored even the offer of a deal

because he had to because it was not formally made, if you take my meaning, but stated what we planned to do which was to vigorously pursue this other area and invited their co-operation. So I think that was a fairly clear response.

5           So there is a classic example of a real deal, that was an attempt. Now obviously that would be very bad indeed to get involved in that kind of thing and I am very pleased that we took the position we did on that particular issue and I am sure we would again in that sort of setting. But that is a very different  
10       kind of beast you can see right away from the kind of thing that John Monteith was talking about.

          THE CHAIRMAN: A legitimate discussion about the implications of a proposed regulation.

          MR. ROBINSON: That is correct whereas that other really  
15       is deal. That is what it would be.

          THE CHAIRMAN: That is the context to put it in, the difference between a legitimate discussion about the implications of a regulation on the operation of an industry out in the open as against a kind of bargain struck.

20       MR. ROBINSON: Bargain struck is the kind I have just indicated.

          THE CHAIRMAN: Yes.



APPENDIX K

Extract (pp.16-19) from the  
Transcript of March 13, 1980





MR. ROBINSON: Just to carry on then, sir, with further questions, turning to question (1)(b):

25 "Was it merely to determine the 'nature and extent of the danger posed by the substance'

as suggested by Section 6(2)? If so, is the Department not as capable (or more capable) of making such a determination by drawing upon its available expertise or should this be subject to some review process in the public interest?"

5 There are a number of comments that can be made about that and I will run through some of my notes here and perhaps add some thoughts that have occurred in the light of the discussion so far.

10 In certain cases where the substance such as PCB has been scheduled with objection, in other words, where there is clear consensus as indicated earlier that this is a nasty that ought to be addressed, and a later objection is made to a specific regulation or proposed amendment to an existing regulation, then clearly the challenge would have to be directed at what you might call a subset of the whole problem, at some specific element in the whole problem. Some of those might include the requirements for the regulation, the technical feasibility of

17  
(continued)

20 the regulation, the economic burden imposed by the regulation,  
the adequacy of the regulation to protect the environment or the  
public health from the problem posed by the particular substance.  
Now in these sorts of situations the Board would be expected in,  
say, the first case, to review the nature and extent of the  
25 danger as it applied to the requirement for the specific regu-

18

lation under challenge. In the second case one would be reviewing  
the technical feasibility of the regulation and refer to the  
nature and extent of the danger solely for the purpose of general  
information. In the third case the Board would wish to satisfy  
5 itself on the economic burden imposed by the regulation and to  
determine if the economic burden appears justified against the  
need for the regulation. So that also brings in, of course, the  
issue of need. And in the fourth case, which I guess is the  
broadest, to review the nature of the proposed regulation and the  
10 regulating strategy together with the nature and extent of the  
danger, which is very broad indeed.

In each case the recommendations of the Board should  
in our view reflect the Board's opinion on the specific nature  
of the objection. The government does not consider that the  
15 Act requires a Board of Review to provide a general review of  
all of the government's control activities, some of which are not  
possible under this Act. Now let me say here that in the present  
situation, the present Board, we did get into a very broad area

and I regard that as most useful but I think that is something  
20 of a rather special case given it was the first Board and there  
were a number of things which we were clearly seeking our way  
through and feeling our way through, but I would say that in the  
normal instance one would think of the Board of Review, and I  
think this is consistent with the apparent intent of the Act,  
25 that it would, in fact, focus on the character of the objection

and undertake its activities related to the character of that  
objection.





APPENDIX L

Extract (pp. 157-159) from the  
Transcript of April 14, 1980



25 | MR. ROBINSON: Sorry, I will repeat some of that.  
| Since the Board is in existence normally for a relatively  
| short period of time, obviously it is easiest to think of it  
| in terms of simply being an appendage during that time of

5 | the department which pays it which is in effect what we  
| are doing at the moment and with some kind of contractual  
| relationship with the individuals involved that all costs  
| otherwise being assumed as to costs of the department and paid  
| accordingly and that is indeed how it now works. The  
| difficulty with that, and I do understand it, is that the Board  
| exists for the purpose of assessing in large measure the  
| adequacy of the work of the department that is its financial  
| master and it is that which is the dilemma and, therefore, if  
10 | it feels that it wishes to do more work the department is  
| theoretically in the position of saying, no, you cannot have  
| any more money. Stop. And it is really that difficult.

15 | Now the other side of the coin, of course, and  
| we have had that experience is where we establish a Board or  
| a hearing or a commission of some kind, a Commission of Inquiry  
| of some kind, do so in a manner which is administratively  
| divorced from the department, and where the department from

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(continued)

20 a budgetary standpoint basically loses control of the situation  
and yet has a charge against its budget which could go on  
indefinitely and indeed in the case that I am thinking of  
it went on a very long time and cost a great deal of money  
and left the department as it were badly burned by the  
experience, which has been part of our difficulty this time  
25 around frankly. And those are in a sense sort of the two  
sides of the situation and it is a question, I suppose, of

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5 coming up with a formulation which, on the one hand,  
guarantees the independence of the structure given that it  
is important to be independent and to be perceived to be  
independent, since it exists for the purpose of assessing  
the work of its parent department or the group for which it  
is ostensibly linked or working, and at the same time  
maintaining a budget responsibility or accountability to  
the parties which, in fact, have to give up the money and have  
to provide it, and it is that dilemma. Now, perhaps if there  
10 were, in fact, a structure in government that took on the  
responsibility of whatever board from an administrative  
standpoint, if I heard some implication of possibly moving in  
that direction, perhaps if there were a structure which had  
the business of running boards from an administrative  
15 perspective, which was manifestly non-political or non-

policy and quite divorced from the departments that were involved in the issue at the moment, then perhaps some kind of middle ground of that sort is exactly what we are looking for, so I just raised that as a possibility.





APPENDIX M

Correspondence between the Board  
and the Deputy Minister, Environment  
Canada, Concerning the Interim Report



ENVIRONMENTAL CONTAMINANTS ACTPCB BOARD OF REVIEW

1302 - 200 Rideau Terrace  
Ottawa, Ontario  
K1M 0Z3

March 18, 1980

Mr. J.B. Seaborn  
Deputy Minister  
14th Floor  
Fontaine Building  
Ottawa, Ontario  
K1A 0H3

Dear Mr. Seaborn:

The questionnaire sent to you which led to the very constructive discussion held with your officials and those of the Department of National Health and Welfare last Thursday, March 13, 1980, omitted a quite important experiment with the present Board's First Report.

You will recall that the Board gave its favorable views on the proposed amendments to Chlorobiphenyl Regulations No. 1 in a preliminary way and before its final Report was completed on February 25, 1980. This it did in a letter to the Ministers dated January 4, 1980, and stating briefly that it was forwarding these favorable views on the proposed amendments in order to facilitate the process of bringing the Order into effect without awaiting the Board's formal and final Report which would take an additional month or two to complete -- which in fact happened.

The letter of January 4, 1980, however, was sidetracked because of the last minute changes in the proposed amendments submitted to the Board on January 31, 1980.

The Board, having studied the January 31 changes, wrote to the Ministers on February 2, 1980, giving its favorable views on these changes -- again with the intention of facilitating the bringing into effect the amendments without awaiting the final and formal Report.

.../2

- 2 -

The Board would appreciate having your views on the value of this system since it is likely to repeat itself as an option for future Boards since the Board's mind may be made up well before its final Report can be submitted with respect to a specific regulation or its amendments.

Yours sincerely,

Original Signed by  
**H. S. THOMPSON**

Maxwell Cohen, Q.C.  
Chairman, PCB Board of Review

c.c. L.F. Marwood  
R.B. Sutherland

E. Ratushny

R.M. Robinson

A.B. Morrison

P. Toft





Ottawa, Ontario  
K1A 0H3

APR 8 1980

Professor Maxwell Cohen  
1302 - 200 Rideau Terrace  
Ottawa, Ontario  
K1M 0Z3

Dear Professor Cohen:

This is in response to your letter of March 18, 1980, in which you requested my views on a system that would facilitate the process of bringing an order into effect.

Your suggestion would appear to have merit. A Board's preliminary views would enable the Government to carry out the many legal and administrative procedures required before the publication of a final order or regulation; consequently, the order could be brought into effect within a reasonably short time after the Ministers have received and made public the Board's formal report.

Yours sincerely,

J.B. Seaborn



APPENDIX N

U.S. Federal Register, Part III, Environmental  
Protection Agency, Proposed Policy on Public  
Participation, Wednesday, April 30, 1980



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Wednesday  
April 30, 1980

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Part III

Environmental  
Protection Agency

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Proposed Policy on Public Participation



**ENVIRONMENTAL PROTECTION AGENCY**

(FRL 1360-4)

**Office of the Administrator****Proposed Policy on Public Participation****AGENCY:** Environmental Protection Agency.**ACTION:** Notice of Proposed Policy on Public Participation.

**SUMMARY:** In order to enhance the ability of the Environmental Protection Agency to manage programs and make decisions in the public interest, the Agency is proposing a formal policy for public participation. Advice and comment from the public is sought at this stage so that when the Agency writes a final policy, it can have the benefit of the public's experience and judgment. An Agency policy will strengthen the hand of the public and make clear to all concerned that public involvement in Agency decision-making is welcome and needed. A degree of standardization in procedures will make it easier for citizens to know what they can expect when they deal with the Agency. The policy will also clarify the responsibility of Agency officials by giving them the mandate to develop public participation measures in the context of program decision-making.

**DATES:** Public comments are invited and should be submitted by June 30, 1980.

**ADDRESSES:** Please submit comments to, or for further information call:

Sharon F. Francis, Special Assistant for Public Participation.  
Office of the Administrator (A-100), U.S. Environmental Protection Agency, Washington, D.C. 20460, Telephone: (202) 245-3066

**Public Meetings:**

A meeting to discuss and receive comment on the proposed policy will be held in Washington, D.C. on May 28, 1980, 9:00 am—12 noon; 1:00 pm—4:00 pm, at E.P.A. Headquarters, Room 3906, 401 "M" Street, S.W. Those who plan on submitting comments at the meeting should, if possible, inform the Office of the Special Assistant to the Administrator for Public Participation, (202) 245-3066, so that presentations and discussion can be scheduled for everyone's convenience.

Regions will be conducting meetings and/or other activities to promote discussion and receive comment on the policy. For information about meetings and other activities, contact your regional coordinator:

*Region I*

David Pickman, (617) 223-0967, Office of Public Awareness, Room 2203, U.S. Environmental Protection Agency, John F. Kennedy Federal Building, Boston, Massachusetts 02203

*Region II*

Ray Pfortner (212) 264-4536, Director, Public Affairs Division, U.S. Environmental Protection Agency, 28 Federal Plaza, New York, New York 10007

*Region III*

George Bochansky, Jr. (215) 597-9370, Chief, Office of Public Awareness, U.S. Environmental Protection Agency, Curtis Building, 6th & Walnut Streets, Philadelphia, Pennsylvania 19108

*Region IV*

Gordon Kenna (404) 881-2013, Office of Public Awareness, U.S. Environmental Protection Agency, 345 Courtland Street N.E., Atlanta, Georgia 30308

*Region V*

Jane Kennealy (312) 353-2072, External Affairs, U.S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60604

*Region VI*

Rick Gentry (214) 767-2630, Public Participation Coordinator, 6-AP, U.S. Environmental Protection Agency, First International Building, 1201 Elm Street, Dallas, Texas 75270

*Region VII*

Betty Harris (816) 374-5894, U.S. Environmental Protection Agency, 1735 Baltimore Street, Kansas City, Missouri 64108

*Region VIII*

Stuart McDonald (303) 327-5927, Public Awareness & Intergovernmental Relations, U.S. Environmental Protection Agency, 1860 Lincoln Street, Denver, Colorado 80295

*Region IX*

Ida Lawson (415) 556-2320, Office of the Regional Administrator, U.S. Environmental Protection Agency, 215 Fremont Street, San Francisco, California 94105

*Region X*

Don Bliss (206) 442-1203, Director, Office of External Affairs, U.S. Environmental Protection Agency, 1200 6th Avenue, Seattle, Washington 98101

**SUPPLEMENTARY INFORMATION:** Public participation is not a new concept at EPA. Indeed the Agency confers extensively with a wide range of members of the public in almost all of its programs. The diversity of this experience, however, has brought the Agency to its current position of recognizing the need to build on the best of what has been learned and to institute common objectives and procedures to aid the entire Agency.

EPA recognizes that all Federal programs are intended to serve the public interest, and all government agencies are, by definition, public servants. EPA's programs directly and indirectly affect the lives of all citizens. These citizens have the right to share in program decisions, and public servants who implement Federal environmental statutes have the responsibility to seek out and be responsive to the concerns of the public in their decisions.

Congress and the President have increasingly directed EPA and other federal agencies to reform traditional governmental practices by providing a greater degree of participation by the public. Through its efforts to improve public participation, EPA is seeking an earlier and potentially more constructive dialogue with the public so that Agency decisions can better reflect the experience and preferences of those who are more affected and thereby improve the Agency's ability to carry out its mandates.

**BACKGROUND**

In April 1978, the Administrator and Deputy Administrator appointed a Special Assistant for Public Participation and asked that person to chair a Task Force whose aim was to recommend ways to strengthen public participation throughout the Agency. One of the first steps by the Task Force was an assessment of EPA's experience to date and an analysis of the Agency's public participation accomplishments. This assessment pinpointed a lack of clear-cut objectives and resources identified for public participation in most programs. It also found that the Agency does a much better job of reaching out to the public, informing it of Agency activities, and creating opportunities

to participate, than it does of assimilating and meaningfully using the results of public involvement.

During the period when the Task Force was completing its assessment, two other significant public participation efforts were underway. First, in response to President Carter's Executive Order 12044 on regulatory reform, the Agency refined and expanded its opportunities for citizen consultation in the regulatory development process. Secondly, a working group within the Office of Water and Waste Management (OWWM) had been developing revised regulations to improve public participation for its areas of responsibility. This group worked closely with interested sectors of the public and received extensive comment from groups including State and local government officials, economic interests, public interest groups, and private citizens.

When regulations for public participation in OWWM programs were proposed in the *Federal Register*, August 7, 1978, one of the questions on which EPA invited comment was whether the proposed OWWM regulations should be limited to OWWM or apply to all EPA activities. There was extensive comment from all sectors of the public in favor of an agencywide public participation measure.

The Public Participation Task Force analysed the alternatives of developing a policy or a regulation. It decided that development of a policy would be administratively simpler, and thus, the Task Force recommended to the Administrator that the Agency undertake the development of this proposed policy.

The draft policy has been under development for the last several months. In addition to consultation within the Agency, an early version was circulated to a sampling of active participants from various sectors of the public and their comments were incorporated in the current draft. Additionally, a meeting was held between the Public Participation Task Force and representatives of various public group and public officials so that their comments could also be added at the earliest stages.

## POLICY INTENT

Several considerations have guided the drafting of this proposed policy. We are seeking a public participation policy that will be viewed as legitimate and meaningful. The public, when it participates, wants to see the effects of its involvement in final decisions. Yet program administrators who need citizen advice also work in a context of tight timetables, and cannot allow public discussion to drift. This, this policy emphasizes "participation by the public in decisions where options are available and alternatives must be weighed or where substantial agreement is needed from the public if a program is to be carried out." By taking this selective approach, the public has the best opportunity to be effective, and contribute positively to program management.

The policy provides an overall framework of purpose, objectives, procedures, and responsibilities, and outlines the general scope of activities to which it will be applied. It leaves considerable discretion to Assistant Administrators, Regional Administrators, and Deputy Assistant Administrators to develop more specific program guidance and to determine the extent of the decisions which will be covered by the policy. This flexibility provides room for the unique differences between programs and assures that the programs themselves will have a key role in decisions about public participation.

The policy is designed to set a basic "floor" for public participation activities, but certainly not a "ceiling." In developing their own guidance or implementing regulations, programs will be able to go farther than the basic provisions

of the policy. OWWM has already promulgated public participation regulations (40 CFR Parts 25 and 35) which conform with this policy. In some areas, the OWWM regulations are more specific than is the proposed policy.

## MAJOR ISSUES

As Task Force members have worked to draft this proposed policy in consultation with colleagues in the various programs and offices, several significant issues have arisen which merit wider discussion. In several cases there are optional approaches that might be taken to carry out aspects of the policy, and the experience and viewpoints of participants themselves are necessary to assure that the Agency reaches the fairest and most feasible course of action.

These issues are summarized in the paragraphs below. Public comment is especially invited on these issues since they are the most difficult and potentially controversial aspects of the policy. In addition, public comment on any other aspects of the policy is welcomed and encouraged.

### 1. Scope of Applicability.

This policy, as proposed, applies to programs carried out by EPA; however, since 80% of the Agency's total budget is spent by State, regional, and local levels of government, the policy also directs Assistant and Regional Administrators to assure that provisions of the policy are incorporated in program regulations and guidance that cover grants to State and local governments, or delegations of authority to other governmental entities.

A major question concerning the implementation of a public participation policy is whether it should apply solely to EPA or also include State and substate agencies when they are carrying out EPA programs. In some instances, States and localities may have established public participation policies and may not welcome the contradiction or confusion that might result from a new federal policy. State and substate entities may also believe that their practices are better than EPA's. It is also true, however, that some State and substate entities have very poor public participation or none at all. Some believe none is necessary. A national policy that reaches to the State and local levels will enable EPA's public participation efforts to be consistent throughout the country. This will promote wider public understanding of when, where, and how citizens can participate in environmental programs.

There are several approaches that might be taken on the scope of activity to which the policy is applied: one option would be to confine the policy only to activities directly carried out by EPA. A second option would be to require that state, regional and local governments carrying out EPA programs achieve substantially equivalent results, but without specifying any procedural requirements which they must follow. The third option is the one we propose, which is to specify that the policy be incorporated in guidance. program grant regulations and delegations of authority to other governmental entities.

In asking for advice on preferences among these options, we hope that commentators will refer to specific experiences or examples wherever possible. Those who prefer the option of substantially equivalent results on the part of state, regional and local governments are especially requested to offer specific suggestions for wording and evaluation criteria. We make this request because substantially equivalent provisions have a history of being easy to espouse but difficult to demonstrate.



## 2. Flexibility.

This draft policy provides for flexibility in two ways. First, Assistant Administrators, Regional Administrators, and Deputy Assistant Administrators are given considerable discretion in identifying major policy actions to which this policy will apply. Second, many parts of the policy are phrased with verbs that imply latitude such as "may," "should," "can," as contrasted with the firm requirements of "must," "shall," and "will."

Those who favor strong requirements believe that managers who want to avoid public participation will do so unless they are given specific guidelines to follow. Public participation is a sufficiently new enterprise in government that many program managers will not know how to carry it out unless given clear and firm direction. On the other side, advocates of more general requirements believe that strict guidelines will inhibit innovation and stifle the spirit of what EPA is trying to accomplish.

The Agency is asking reviewers of the policy whether the qualifying language that is proposed includes sufficient flexibility for program managers, whether effective participation will be too readily compromised, whether any of the mandatory procedures should be made optional, or any of the flexible provisions made requisite.

## 3. Adequacy of Hearings.

Hearings are legally required in a large number of programs. In many instances they have been one of the few, if not the only, public participation activities undertaken. All too often the public has complained that hearings were unsatisfactory because they did not have the time or resources to prepare for them, or because the agency apparently had already "made up its mind." These deficiencies have led to poor participation, with agency officials criticizing hearings because only a handful of people came, or testimony was too general.

Several aspects of this proposed policy will address questions about the adequacy of hearings: contact lists of the interested and affected public will be used on projects; background information will address issues and will be designed to facilitate better public understanding; participation will be sought when options and alternatives exist, not after a decision is made; Responsiveness Summaries will document how public preferences were incorporated in a decision.

In addition to these general requirements of the policy, there are a number of specific provisions to strengthen the usefulness of hearings themselves; notice of forthcoming hearings will be given 45 days in advance, except under certain circumstances when 30 days will be permissible; background information will be available to the public as early as possible; hearing notices will specify the information that is sought from the public, officials who conduct hearings will outline issues to be addressed; and finally hearing records will be conveniently available.

There are several questions about hearing adequacy which we would like to emphasize for comment:

### a. Timing of Notice.

Is 45 days advance notice necessary, or is it adequate, to allow for mail delays and still give the public sufficient time to prepare for a hearing? Are the exceptions to this requirement we have cited in the draft policy sufficient? Have established 30 day requirements been adequate?

### b. Availability of Information.

Does the proposed policy give the public understandable background information and access to documents

sufficiently in advance to be useful in developing hearing testimony? Or will this requirement lead to time consuming delays and unnecessary paperwork?

### c. Responsiveness.

Are the measures proposed in the policy for conducting hearings and providing a record of hearings adequate to assure that the agency holding the hearing is responsive to public testimony? We have not specifically required that Responsiveness Summaries be prepared after every hearing, because they are to be done at key decision points, and a decision may not be made immediately after a hearing but rather a number of months later. Would there be benefit in having Responsiveness Summaries done after each hearing anyway? Or should a summary of the hearing testimony be prepared and forwarded to the appropriate decisionmaking official? Should decision-making officials be required to certify that they have reviewed hearing testimony, and been responsive to it in making their decision? Should any specific feedback be provided to those who testified at a hearing?

It will be especially helpful to EPA if commentators can provide examples or experience to augment their views on these questions about adequacy of hearings.

## 4. Advisory Group Membership.

In a number of instances, EPA program regulations call upon state or substate agencies to form advisory groups to assist in program planning or implementation. These groups assist elected and appointed decision-making officials by becoming familiar with plans and programs funded by Federal grants, making recommendations to decision-making officials, and encouraging interchange and mutual education among the interests represented on the group.

Substantial experience with advisory groups on the part of this Agency demonstrates that the kinds of people selected for advisory committee membership determines the kinds of advice given, and therefore, that a conscious effort to achieve balanced membership among interests is necessary to achieve balanced advice. Too often advisory committees are dominated by only one of the varied interests. Therefore, EPA is proposing in this policy that any advisory group required by EPA of State or substate grantees be comprised of "substantially equivalent proportions of four groups: private citizens, representatives of public interest groups, citizens or representatives of organizations with substantial economic interest in the matter under study, and public officials. This requirement has been the center of a great deal of discussion and debate. Some see the requirement as unnecessary or overly complex, while others see it as completely necessary to achieve a fair balance among interests.

In addition to this proposed option, the Agency would like to invite comment on several alternative approaches to the question of advisory committee membership. Should officials responsible for selecting advisory groups demonstrate "proof of effort" in finding a balanced group? Should membership be required to be equal among the four categories, rather than "substantially equivalent?" Should we delete specific descriptions of the four major groups and only specify that advisory committees be "equitably representative?" Should each program be directed to develop its own advisory committee requirements as OWWM has already done? If the policy specifies that public officials be included, should it specify elected public officials, or should it be flexible about both elected and administrative members?

The experience of commentators will be helpful to EPA in the final development of policy on this issue.

## 5. Compliance.

This policy proposes that Assistant Administrators, Office Directors and Regional Administrators are responsible for assuring compliance with the its provisions. They are not directed to report on their results because of the paperwork burdens that would occur.

We are asking reviewers of this policy to consider the most effective means for ensuring its enforcement.

Some believe that little can be accomplished unless specified action can be taken against those who do not comply with the policy. Others feel results in public participation can only be realized through "good faith" effort and the results of training and experience. They argue that imposing sanctions would cause resentment in program managers, who as a result would follow the letter of the policy, but perhaps ignore its intent.

## 6. Resource Implications.

By itself the policy is not going to impose significant new expenses on the Agency or its state and substate grantees. It will, instead, guide the planning for expenses and give this planning a purpose and a clear relationship to improved decision-making. Already EPA programs are allocating resources to public outreach and involvement activities, and it can be expected that these policy requirements will serve to refocus some existing allocations. The extent to which reallocations or new budgeting will be required to carry out the policy will be determined by the individual programs.

Some increase in resource requirements can be foreseen in the staff time that will be needed to prepare Responsiveness Summaries. The policy also will result in increased expenditures for mailings, preparation of fact sheets, and other informational materials, and for the expenses of advisory committees. The pilot projects for providing compensation to citizens for participation in rulemaking will also entail new expenditures.

The increased expenditures that may be needed to carry out this policy cannot properly be identified until the program and regional offices have identified the actions and decisions to which the policy will apply and developed the appropriate public participation work plans. Any new resource requirements will become part of the budget development process of the Agency. Implicit in the policy is the assumption that priorities must be selected and scarce funds allocated prudently. The public should not develop unreasonably high hopes that there will be new funds available.

The increased sums that may be to be necessary to strengthen public participation in EPA programs need to be weighed, in part, against the savings to the Agency that greater public involvement may buy. Citizens are good watchdogs of the public purse, and will speak up against wasteful practices, if they are aware of them. Further, their involvement may save the public the high costs of litigation, and the wasted expense of plans that cannot be implemented or projects that cannot be completed for lack of public support. One of the principal reasons why EPA is expanding its public participation efforts by proposing this policy at this time is the belief that greater citizen involvement will lead to real savings and better programs for the Agency.

Dated April 9, 1980.

Douglas M. Costle,  
Administrator.

## PROPOSED E.P.A. POLICY ON PUBLIC PARTICIPATION

This policy addresses participation by the public in decision-making and rulemaking by the Environmental Protection Agency. The term, "the public" as it is used here, means the people as a whole, the general populace. There are a number of identifiable "segment of the public" who may have a particular interest or who may be affected one way or another by a given program or decision. In addition to private citizens, "the public" includes, among others, representatives of consumer, environmental and minority groups, trade, industrial, agricultural, and labor organizations; public health, scientific, and professional societies; civic associations; universities, educational and governmental associations; and public officials.

"Public participation" is that part of the Agency's decision-making process which provides opportunity and encouragement for the public to express their views to the Agency, and assures that the Agency will give due consideration to public concerns, values and preferences when decisions are made.

The requirements and procedures contained in this policy apply to the Environmental Protection Agency. The activities covered by this policy are:

- EPA rulemaking, when regulations are classified as significant;

- The administration of permit programs as delineated in applicable permit program regulations;

- Program activities supported by EPA financial assistance (grants and cooperative agreements) to State and substate governments;

- The process leading to a determination of approval of State administration of a program in lieu of Federal administration;

- Major policy decisions, as determined by the Administrator, appropriate Assistant Administrator, Regional Administrator, or Deputy Assistant Administrator, in view of the Agency's responsibility to involve the public in important decisions.

When covered activities are governed by EPA regulations or program guidance, the provisions of the policy shall be included at appropriate points in these documents.

## A. PURPOSE

The purpose of this policy is to strengthen EPA's commitment to public participation and establish uniform procedures for participation by the public in EPA's decision-making process. A strong policy and consistent procedures will make it easier for the public to become involved and affect the outcome of the Agency's decisions. This in turn will assist EPA in carrying out its mission, by giving a better understanding of the public's viewpoints, concerns, and preferences. It should also make the Agency's decisions more acceptable to those who are most concerned and affected by them.

Agency officials will provide for, encourage, and assist participation by the public. Officials should strive to communicate with and listen to all sectors of the public. This will require them to give extra encouragement and assistance to some sectors, such as minorities, that may have fewer opportunities or resources.

Public participation must begin early in the decision-making process and continue throughout the process as necessary. The Agency must set forth options and alternatives before-hand, and seek the public's opinion on them. Merely conferring with the public after a decision is made does not achieve this purpose.

The policy identifies those requirements which are mandatory and others which are discretionary on the part of



Agency administrators. The policy assumes, however, that agency employees will strive to do more than the minimum required. The policy recognizes the Agency's need to set priorities for its use of resources, and emphasizes participation by the public in decisions where options are available and alternatives must be weighed or where substantial agreement is needed from the public if a program is to be carried out.

## B. OBJECTIVES

In establishing a policy on public participation, EPA has the following objectives:

- To promote the public's involvement in implementing environmental laws;
- To make sure that the public understands official programs and proposed actions;
- To keep the public informed about significant issues and changes in proposed programs or projects, as they arise;
- To make sure that the government understands public concerns and is responsive to them;
- To demonstrate that the agency consults with interested or affected segments of the public and takes public viewpoints into consideration when decisions are made;
- To foster a spirit of mutual trust and openness between public agencies and the public.

## C. GENERAL PROCEDURES FOR ALL PROGRAMS

Each Assistant Administrator, Office Director or Regional Administrator shall determine those forthcoming decisions or activities to which this policy should be applied, and take the steps needed to assure that adequate public participation measures are developed and implemented.

To ensure effective public participation, the Agency must carry out these five basic functions: Identification, Outreach Dialogue, Assimilation and Feedback.

### 1. Identification.

It is important to identify those groups or members of the public who may be interested in, or affected by, a forthcoming action. This may be done by developing mailing lists, requesting names of individuals to include from others in the Agency or from key public groups, using questionnaires or surveys to find out levels of awareness, or by other means.

The responsible official(s) shall develop a contact list for each program or project, and add to the list whenever members of the public request it.

### 2. Outreach.

The public can contribute effectively to agency programs only if they are provided with accurate, understandable, pertinent and timely information on issues and decisions. The Agency must make sure that the information concerning a forthcoming action or decision reaches the public. This can be accomplished through mailings, personal communication by telephone, public service announcements, media ads, depositories, and other means. The key aspects of an outreach program are:

#### a. Content.

This must include background information, a timetable of proposed action, summaries of lengthy documents or technical material where relevant, a delineation of issues, and specific encouragement to stimulate active participation by the public.

Whenever possible, the social, economic and environmental consequences of proposed decisions should be clearly stated in outreach material. Fact sheets, news releases, newsletters and similar publications may be used to provide notice of availability of materials and to facilitate public understanding of more complex documents, but should not be a substitute for public access to the complete documents.

#### b. Notification.

The Agency must notify all parties on the contact list of opportunities to participate and provide appropriate information. The media must also be notified.

#### c. Timing.

Notification (above) must take place well enough in advance of the Agency's action to permit the public to respond. Generally, it should take place not less than 30 days before the proposed action, or 45 days in the case of public hearings (Exceptions in the case of public hearings are discussed under *Dialogue*, below.)

#### d. Fees for copying.

Whenever possible, the Agency should provide copies of relevant documents, free of charge. Free copies may be reserved for private citizens and public interest organizations with limited funds. Any charges must be consistent with requirements under the Freedom of Information Act as set forth in 40 CFR Part 2.

#### e. Depositories.

The Agency shall provide one or more central collections of documents, reports, studies, plans, etc. relating to controversial issues or significant decisions in a location or locations convenient to the public.

## 3. Dialogue.

There must be dialogue between officials responsible for the forthcoming action or decision and the interested and affected members of the public. This involves exchange of views and open exploration of issues, alternatives, and consequences. Dialogue may take several forms such as meetings, workshops, hearings, personal correspondence, and may include establishment of special groups such as advisory committees or task forces.

Public consultation must be preceded by timely distribution of information and must occur sufficiently in advance of decision-making to make sure that the public's options are not foreclosed, and to permit response to public views prior to agency action. Opportunities for dialogue shall be provided at times and places which, to the maximum feasible, facilitate attendance or participation by the public. Whenever possible, public meetings should be held during non-work hours, such as evenings or weekends, and at locations accessible to public transportation.

#### a. Requirements for Public Hearings.

(1) *Timing of Notice.* Notices must be well publicized and mailed to all interested and affected parties on the contact list (see 1. above) and to the media at least 45 days prior to the date of the hearing. However, when the Assistant Administrator or Regional Administrator finds that no reviews of substantial documents is necessary for effective participation and there are no complex or controversial matters to be addressed, the notice requirement may be reduced to no less than 30 days in advance of the hearing. Additionally, in permit programs, notice requirements will be



governed by permit regulations and will be no less than 30 days. Assistant Administrators or Regional Administrators may further reduce or waive the requirement for advance notice of a hearing in emergency situations where there is imminent danger to public health and safety, or in situations where there is a legally-mandated timetable.

(2) *Content of Notice.* The notice must identify the matters to be discussed at the hearing and must include or be accompanied by a discussion of the agency's tentative conclusions on major issues (if any), information on the availability of a bibliography of relevant materials (if appropriate), procedures for obtaining further information, and information which the Agency particularly solicits from the public.

(3) *Provision of Information.* All reports, documents and data relevant to the discussions at public hearings must be available to the public on request as soon as available to agency staff. Background information should be provided no later than 30 days prior to the hearing.

(4) *Conduct of Hearing.* The Agency conducting the hearing must inform the audience of the issues involved in the decision to be made, the considerations the Agency will take into account under law and regulations, the Agency's tentative conclusions (if any), and the information which the Agency particularly solicits from the public. The hearing officer should consider holding a question and answer period to clarify information. Procedures must not unduly inhibit free expression of views.

(5) *Record of Hearing.* The hearing record must be left open for at least ten days to receive additional comment, and may be kept open longer, at the discretion of the hearing officer. The Agency must prepare a transcript or other complete record of the proceeding and it must be available at an adequate number of locations. Copies should be provided at cost. If tapes are used, they should be available for use and copying on conventional equipment. When a Responsiveness Summary (see Assimilation below) is prepared after a hearing, it must be provided to those who testified at or attended the hearing as well as anyone who requests it.

#### *b. Requirements for Advisory Groups.*

When EPA establishes an advisory group, provisions of the Federal Advisory Committee Act (Pub. L. 92-463) and OMB Circular A-63 must be followed.

The primary function of an advisory group is to assist elected or appointed officials by making recommendations to them on relevant issues. These issues may include policy development, project alternatives, grant applications, work plans, major contracts, interagency agreements, budget submissions, among others. Advisory groups can provide a forum for addressing issues, promote constructive dialogue among the various interests represented on the group, and enhance community understanding of the agency's action.

In instances where advisory committees are called for in program guidance, regulations, or the public participation work plans of State, substate, or local agencies, the following special requirements will apply:

(1) *Composition of Advisory Groups.* Agencies must try to constitute advisory groups so that the membership reflects a balance of interests, and consists of substantially equivalent proportions of the following groups:

- Private citizens. This portion of the advisory group should not include anyone who is likely to incur a financial gain or loss greater than that of an average homeowner, taxpayer or consumer as a result of any action that is likely to be taken by the managing agency.
- Representatives of public interest groups. A "public interest group" is an organization which has a general civic,

social, recreational, environmental or public health perspective in the area and which does not directly reflect the economic interests of its membership.

- Federal, State and local officials.
- Citizens or representatives of organizations that have substantial economic interests in the plan or project.

Generally, where an activity has a particular geographic focus, the advisory group should be composed of persons from that geographic area unless issues involved are of national application.

(2) *Resources for Advisory Groups.* To the extent possible, agencies shall identify professional and clerical staff time which the advisory group may depend upon for assistance, and provide the advisory group with an operating budget which may be used for mailing, duplicating, technical assistance, and other purposes the advisory group and the agency have agreed upon. The agency should establish a system for reimbursing advisory group members for reasonable out-of-pocket expenses that relate to their participation on the advisory group.

#### **4. Assimilation.**

Assimilating public viewpoints and preferences into final conclusions involves putting together the results of "Outreach" and "Dialogue." The agency must then demonstrate, in its decisions and actions, that it has understood and fully considered public concerns. Assimilation of public views must include the following three elements:

##### *a. Documentation.*

The agency must briefly and clearly document consideration of the public's views in Responsiveness Summaries, regulatory preambles, or other appropriate forms. This should be done at decision points that have been specified in program guidance or in work plans for public participation.

##### *b. Content.*

Each Responsiveness Summary (or similar document) must:

- explain briefly the type of public participation activity that was conducted;
- identify those who participated;
- describe the matters on which the public was consulted;
- summarize the public's views, important comments, criticisms and suggestions; and
- set forth the agency's specific responses, in terms of modifying the proposed action, or explaining why the agency rejected proposals made by the public.

##### *c. Use.*

The Agency must use Responsiveness Summaries in its decision-making.

In addition, final Responsiveness Summaries that are prepared by an agency receiving financial assistance from EPA must also include that agency's (and where applicable, its advisory group's) evaluation of its public participation program.

#### **5. Feedback.**

The Agency must provide feedback to participants and interested parties concerning the outcome of the public's involvement. Feedback may be in the form of personal letters or phone calls, if the number of participants is small. Alternatively, the Agency may mail a Responsiveness Summary to those on the contact list, or may publish it. Feedback must contain the following elements:

**a. Content.**

The feedback that the agency gives must include a statement of the action that was taken, and must indicate the effect the public's comments had on that action.

**b. Availability.**

Agency officials must take the initiative in giving appropriate feedback and must assure that all public participants in a particular activity have access to that feedback. As Responsiveness Summaries are prepared their availability should be announced to the public. When regulations are developed, reprints of preambles and final regulations must be provided to all who commented.

**D. ASSISTANCE TO THE PUBLIC**

Assistant Administrators, Office Directors, and Regional Administrators will provide funds to outside organizations and individuals for public participation activities which EPA managers deem appropriate and essential for achieving program goals and which do not involve rulemaking activities. These activities may be funded through contracts, grants and cooperative agreements, or direct compensation for expenses.

Assistant Administrators, Office Directors and Regional Administrators will encourage and provide whenever possible, small grants to state, regional and local organizations to facilitate informed participation in forthcoming decisions and activities. Projects having national impact as well as those promoting coordination and integration across program lines may also be supported. Notices of the availability of funds will indicate the criteria by which EPA will evaluate the proposals. A panel is to be established for evaluation of proposals where funding is expected to exceed \$50,000.

In the area of funding participation in regulatory activities, the Agency will conduct a small number of pilot projects involving compensation for rulemaking during Fiscal Year 1980. EPA will evaluate these pilot projects to determine what changes in the requirements, if any, are necessary to enhance the effectiveness of this activity.

**Business Opportunities.**

The policy of EPA is to encourage increased business opportunities for both minorities and women. This policy is currently applied to three programs under the Clean Water Act. It is the intention of the Agency to expand the scope of its MBE (Minority Business Enterprise) and WBE (Women's Business Enterprise) goals to include other areas of Agency activities. Funds devoted to public participation will be included in this process.

**Participation Funding.**

Any financial assistance awarded by the Agency should be based on the criteria: (1) is the potential recipient of funds an interested or affected party who is likely to contribute to a better process or a better decision; and (2) would that party be unlikely to participate effectively in the absence of funding? These are the primary tests for public participation financial assistance. From the pool of those who meet these two tests, the Agency will make special efforts to provide assistance to groups—particularly the disadvantaged, minorities and women—who may have had fewer opportunities or insufficient resources to participate.

**E. AUTHORITY AND RESPONSIBILITY**

1. *EPA Assistant Administrators, Office Directors and Regional Administrators* will be responsible for determining

the need for public involvement in activities under their jurisdiction, and for meeting that need. The responsible Agency official must address those activities where application of this policy is required, and identify forthcoming major policy decisions where it should also be applied. They must set priorities, amend regulations as necessary, develop appropriate guidance, and undertake development of work plans for public participation. The Assistant Administrator, Regional Administrator, or Director must allocate resources—including qualified personnel and the necessary funds—to public information and participation activities, and must see to it that there are assistance and incentive programs to support grant regulations or delegations of authority to other governmental entities. They must ensure that public participation is included by grantees in the development of program funding applications to EPA and at other significant decision points.

Assistant Administrators and Regional Administrators will develop initial public participation work plans within 30 days after this policy becomes effective and do so annually thereafter. They must also evaluate public participation activities as necessary.

2. *At Headquarters* Assistant Administrators and Office Directors shall provide guidance and resources for carrying out this policy in program areas under their jurisdictions, conduct public awareness activities to facilitate participation in agency decisions, conduct public participation in national policy development, fund pilot or demonstration projects, provide advice and assistance to support regional office activities, and coordinate and evaluate regional office activities.

3. *Regional Administrators* shall support and assist the public participation activities of Headquarters. They must also assist State, regional and local agencies conducting public participation activities with EPA grant money, and evaluate those activities. They should encourage consolidation of public participation activities when appropriate. Where EPA programs are delegated to a State, regional, or local entity, Regional Administrators will review the public participation activities conducted by that entity.

**F. WORK PLANS**

Public participation work plans, undertaken by EPA or by applicants for EPA financial assistance shall set forth, at a minimum:

1. Staff contacts and budget resources to be allocated to public participation;
2. Segments of the public targeted for involvement;
3. Proposed schedule for public participation activities to impact program decisions;
4. Identification of mechanisms to apply the five basic functions—Identification, Outreach, Dialogue, Assimilation and Feedback—outlined in Section C of this Policy.

All reasonable costs of public participation incurred by assisted agencies and identified in an approved public participation work plan will be eligible for financial assistance.

EPA program offices and regions will also develop work plans that will match public participation resources to program priorities and major decisions, as appropriate, to carry out this policy. Work plans will be reviewed by the Special Assistant for Public Participation and by the Public Participation Task Force and the results of this analysis will be forwarded to the Administrator for appropriate action.

**G. COMPLIANCE**

Assistant Administrators, Office Directors and Regional Administrators are responsible for making certain that, for



the activities under their jurisdiction, all those concerned comply with the public participation requirements set forth in this policy.

EPA will evaluate compliance with public participation requirements in approved State programs. This will be done during the annual review of the State's program(s) which is required by grant provisions, and during any other program audit or review of the State's program(s).

The Administrator of EPA has final authority and responsibility for ensuring compliance. Citizens with information concerning apparent failures to comply with these public participation requirements should first notify the appropriate Regional Administrator or Assistant Administrator, and then if necessary, the Administrator. The Regional Administrator, Assistant Administrator or Administrator will make certain that instances of alleged non-compliance are promptly investigated and that corrective action is taken where necessary.

#### APPENDIX—LIST OF CITATIONS COVERING PROGRAM GRANTS OR DELEGATIONS TO STATE AND SUBSTATE GOVERNMENTS

The Public Participation Policy will be applied to program regulations that cover grants or delegations of authority to State or substate governments or approval of State programs. Where consolidated grants exist under these provisions, they also will be covered. Programs under CWA, SDWA, and RCRA are already covered by this policy insofar as they have been amended or will be amended to incorporate 40 CFR, Part 25. Consolidated permit programs are covered by 40 CFR, Parts 122, 123 and 124. We are citing the statutes because some of the programs are not yet in place, and therefore have not generated regulations. Regulations that refer to existing programs covered by the Policy will have to be amended to reflect the Policy upon its implementation.

##### *Clean Air Act (Pub. L. 95-95)*

- Sec. 105—Grants to State and local air pollution control agencies for support of air pollution planning and control programs.
- Sec. 106—Grants to interstate air quality agencies and commissions to develop implementation plans for interstate air quality control regions. [When funded].
- Sec. 175—Grants to organizations of local elected officials with transportation or air quality maintenance responsibilities for air quality maintenance planning.
- Sec. 210—Grants to State agencies for developing and maintaining effective vehicle emission devices and systems inspection and emission testing and control programs. [When funded].

##### *Quiet Communities Act (Pub. L. 95-609)*

- Sec. 14(c)—Grants to State and substate governments and regional planning agencies for planning, developing, evaluating, and demonstrating techniques for quiet communities.

##### *Toxic Substances Control Act (Pub. L. 94-469)*

- Sec. 28—Grants to State for establishing and operating programs to complete EPA efforts in preventing or eliminating risks to health or environment from chemicals.

##### *Federal Insecticide, Fungicide and Rodenticide Act (Pub. L. 95-396)*

- Sec. 23(a)—Funding to States/Indian tribes through cooperative agreements for enforcement and applicator training and certification.

##### *Resource Conservation and Recovery Act (Pub. L. 94-580)*

- Sec. 3005(a)—Issuance of permits for treatment, storage and disposal of hazardous waste.
- Sec. 3009—Delegation of authority to administer and enforce hazardous waste program.
- Sec. 4002—State Planning Guidelines.
- Sec. 4007—Approval for State, local, and regional authorities to implement State or Regional Solid Waste Plans and be eligible for Federal assistance.
- Sec. 4008—Grants to State and substate agencies for solid waste management, resource recovery and conservation, and hazardous waste management.

Sec. 4009—Grants to States for rural areas' solid waste management facilities.

Sec. 7007—Grants or contracts for States, interstate agency, municipality and other organizations for training personnel in occupations related to solid waste management and resource recovery.

Sec. 8006—Grants to State, municipal, interstate or intermunicipal agency for resource recovery systems or improved solid waste disposal facilities.

##### *Safe Drinking Water Act (Pub. L. 95-190)*

Sec. 1421(b)—Issuance of permits for underground injection control programs.

Sec. 1443(a)—Grants to States for public water system supervision

Sec. 1443(b)—Grants to States for underground water source protection programs.

##### *Clean Water Act (P.L. 95-217)*

Sec. 106—Grants to State and interstate agencies for water pollution control administration.

Sec. 201—Grants to State, municipality, or intermunicipal agencies for construction of wastewater treatment works.

Sec. 208—Delegation of management of construction grants programs to State designated agency(ies), grants for areawide waste treatment management planning.

Sec. 314—Clean Lakes Program.

Sec. 402(a)—Issuance of permits under National Pollution Discharge Elimination System.

Sec. 404—Issuance of permits for disposal of dredge and fill materials.

Pub. L. 94-580, Sections 3005 & 3006;

Pub. L. 95-190, Sections 1421-1423;

Pub. L. 95-217, Section 402;

Pub. L. 95-217, Section 404;

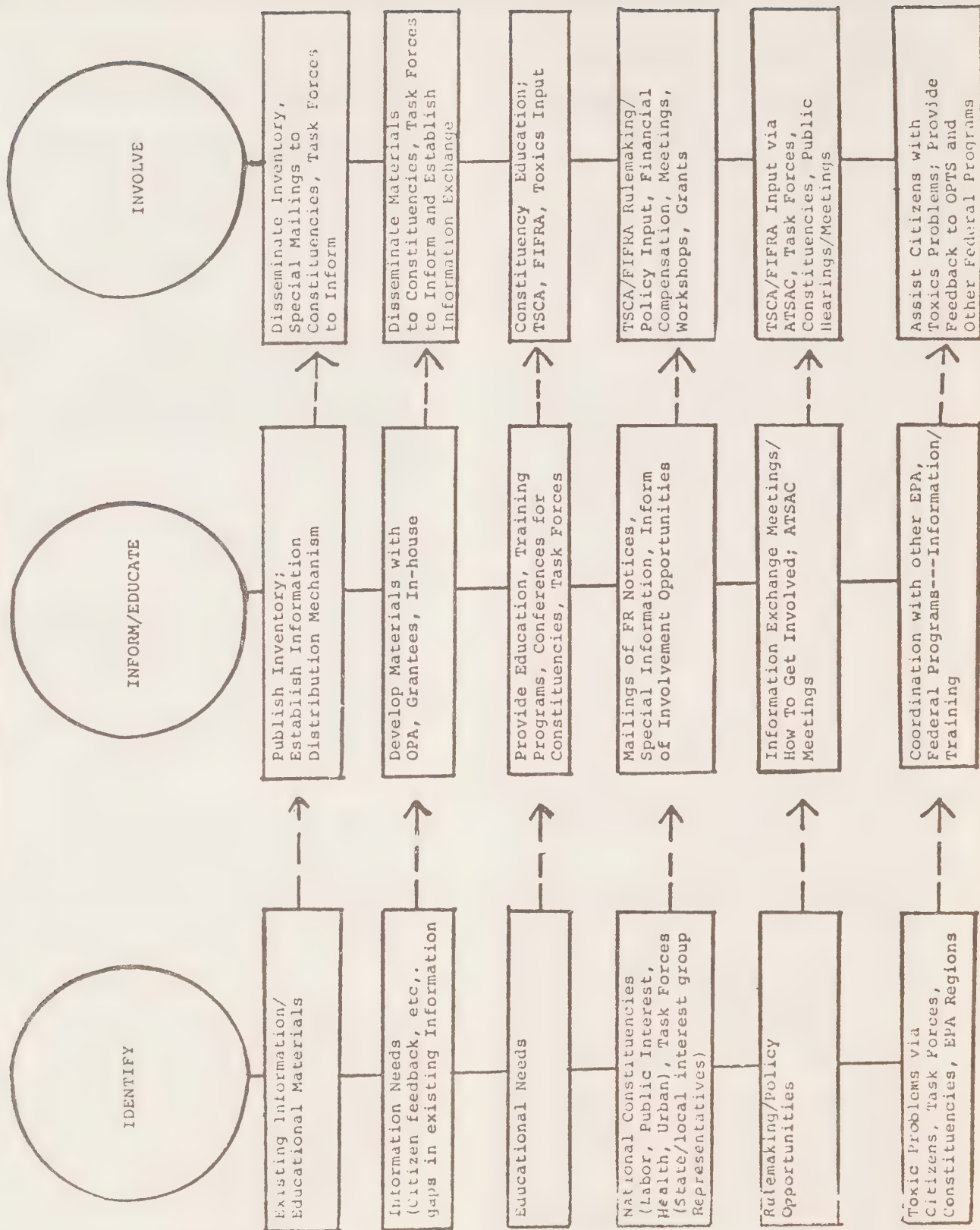
Pub. L. 95-95, Section 165;

Proposed consolidated permit regulations, covering: Hazardous Waste Program under RCRA; UIC Program under SDWA, NPDES and section 404 of the Clean Water Act, and the PSD Program under the Clean Air Act.

[FR Doc. 80-13095 Filed 4-29-80; 8:45 am]

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# OPTS PUBLIC PARTICIPATION OBJECTIVES



United States  
Environmental Protection  
Agency

Press Office (A-107)  
Washington DC 20460



# Environmental News

FOR IMMEDIATE RELEASE  
THURSDAY, MARCH 27, 1980

Johnson (202) 755-0344

EPA LISTS 210  
REGULATIONS UNDER  
DEVELOPMENT

In an effort to keep the public informed on the progress of current regulations, the Environmental Protection Agency issued on March 14 an Agenda of 210 Regulations currently under development and invited public participation in their formulation.

EPA prepares and issues regulations to implement environmental programs in the areas of air and water pollution control, drinking water protection, noise abatement, radiation protection, solid waste management and pesticides and toxic substances control.

The agenda includes new regulations, existing regulations which the Agency is reviewing or revising, and non-regulatory actions which the Agency believes are important. Along with each regulation is a brief description of the regulation, the name of the EPA contact person and an estimated schedule for issuance. Interested persons are encouraged to get touch with these contact people to provide or obtain information concerning the development of these regulations.

EPA will issue its next agenda in June 1980, and thereafter in December and June on a semi-annual basis.

To obtain copies of this or future agenda, please contact Penelope Parker, Environmental Protection Agency, Standards and Regulations Division, PM 223, Washington, D.C. 20460 or telephone (202) 755-2693.

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APPENDIX 0

Extract (pp.133-135) from the  
Transcript of March 13, 1980



20 THE CHAIRMAN: Can you explain, Mr. Robinson, the fewness  
of what I would have thought a very useful device. How come  
there aren't more of those?

MR. ROBINSON: Well, I suppose if you look at how few  
substances we have actually controlled or moved to control and  
25 the nature of them, I guess that is a good part of it. In the  
case of the one where there was a controversial, you might say,  
[Page 135 follows]

135

base for taking some action, which is the chlorofluorocarbons,  
we made use of an existing structure that is similar in concept  
to the advisory committees contemplated under the Act. In the  
case of PCB where, as we have discussed at some length, there  
5 wasn't that same degree of controversy about the substance per se,  
and where we were dealing rather more with the strategy of  
physically containing it or eliminating it --





APPENDIX P

Extract (pp.137-138) from the  
Transcript of March 13, 1980



DR. BRYDON: I have thought a great deal about this particular subject over the years and the problem in my mind is the distinction between science and science policy and risk and risk policy and regulation and regulation policy and what part of those particular aspects of our business 1) needs these advisory committees. And if I may go back to PCB situation, for example, we had in effect an advisory committee on PCBs. It was called a task force where representatives from the Ontario Research Foundation, from the University of Guelph, mostly government scientists from various departments, but that was a scientific advisory committee, if you like, to us in administration for portraying all the scientific evidence and making some recommendations of needs. Then once that was prepared then we had<sup>to</sup> come to grips with what we were going to do, how we were going to respond to those recommendations, those perceived needs. A lot of that was done internally. Some of it was done by the vehicle of the consultant with the seminar that Mr. Robinson has mentioned so far. Then having gone that far, there is the socio-economic impact analysis aspect which we began not in those particular terms with those particular directives from the Treasury Board, from the government, but those three specific stages in our thinking and to be perfectly frank I, in my own mind, am not exactly sure of the policy evolving on public participation and I am not sure in my own mind of the narrow specific

definition or function or role of these advisory committees.

THE CHAIRMAN: We were puzzled too, we were puzzled too. Does that mean that in answer to the question then at the moment it is very difficult to say what over the long run is the inter-  
5 facing of the work of the joint advisory board which may or may not be established and future Boards of Review in the same field? It is difficult at the moment to see how they relate.

DR. BRYDON: I would, personally, turn that comment around to address the relationship between this evolving public  
10 participation policy that Mr. Robinson has been talking about and future Boards of Review. It addresses the same question that Dr. Sutherland raised. He and you have put it in terms of a hearing specifically. I would prefer personally to broaden it into that whole policy of public participation, how can we most effectively  
15 handle that in the initial stages in this three-stage development --

THE CHAIRMAN: Without being hung up on the hearing idea?

DR. BRYDON: Thank you.

MR. ROBINSON: Which is really a tool.

20 THE CHAIRMAN: But regrettably from the point of view of public opinion the most credible of tools.

MR. ROBINSON: It may well be and maybe not even regrettably. You know, it has a certain chemistry that can be very valuable.

APPENDIX Q

Extract (p.219) from the  
Transcript of April 14, 1980





MR. ROBERTSON: We couldn't. We hope our credibility is good enough, but then again, I think that really if we weren't even in the same building it might help, if the office was not in the same building. I think that really we are independent other than from logistical purposes but by the same token I think we must appear to be independent, not only in actual fact and that is why I think we feel very strongly, as does, for example, the Canadian Environmental Advisory Council report on the process. They were very strong on that point and it has been a source of criticism from just about everybody who has written on the process in the last three or four years. They have all underlined this point and the independence of FEARO and not only the actual but the apparent independence is vitally important. I would think that a referral from the Department of the Environment, I would think one would want to bear the apparent subservience or non-arm's length relationship of the two bodies would be something to be borne in mind in selecting the members of the panel, for example. But again, it is an independent panel reporting to, unfortunately it would be the same Minister in this case, but nevertheless, the report would be undoubtedly made public and whatever the panel honestly recommended would be --

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APPENDIX R

Correspondence between the Board and the  
Deputy Minister, Environment Canada,  
Concerning Consultative Processes



ENVIRONMENTAL CONTAMINANTS ACTPCB BOARD OF REVIEW

1302 - 200 Rideau Terrace  
Ottawa, Ontario  
K1M 0Z3

April 15, 1980

Mr. J.B. Seaborn  
Deputy Minister  
Environment Canada  
14th Floor  
Fontaine Building  
Ottawa, Ontario  
K1A 0H3

Dear Mr. Seaborn:

Re: Second Report of PCB Board  
of Review

Mr. Ratushny on behalf of the Board already has raised some of the following questions informally with officials of your department. I now feel it is desirable to make these reports more specific and formal.

In the course of our research in relation to the forthcoming second report, it has come to our attention that there are other processes within Environment Canada which involve public consultation as a prelude to governmental decision-making in the environmental protection area. For example, we have had drawn to our attention the process of F.E.A.R.O., the existence of the Canadian Environmental Advisory Council and, indeed, the informal consultation processes under the Environmental Contaminants Act. We are concerned that, for the purposes of our second report, we may not be sufficiently familiar with these or other possible processes, which may exist within Environment Canada or the Government, generally, in relation to environmental regulations.

We would, therefore, appreciate receiving from you, the following information:

- (1) A listing of all consultative steps which have been taken in relation to the Environmental Contaminants Act (advisory committees, informal seminars, etc.), including a general description of the participants;

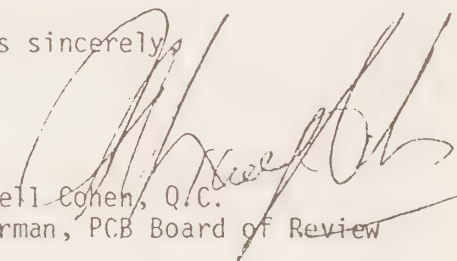


- (2) A listing of all other consultative processes which have been established in relation to environmental protection, both within Environment Canada and elsewhere within the Government and a brief description of the nature of these processes.

We are concerned that we be aware of all techniques currently being utilized as well as the desirability of avoiding unnecessary duplication in governmental processes.

With many thanks.

Yours sincerely,



Maxwell Cohen, Q.C.  
Chairman, PCB Board of Review

c.c. R.M. Robinson

ENVIRONMENTAL CONTAMINANTS ACTPCB BOARD OF REVIEW

1302 - 200 Rideau Terrace  
Ottawa, Ontario  
K1M 0Z3

April 22, 1980

Mr. J.B. Seaborn  
Deputy Minister  
Environment Canada  
14th Floor  
Fontaine Building  
Ottawa, Ontario  
K1A 0H3

Dear Mr. Seaborn:

Re: PCB Board of Review Second Report

Pursuant to my letter dated April 15, 1980, there is one further matter upon which we would appreciate receiving clarification from your Department before commencing the draft of our Second Report.

It has occurred to us that we do not have, anywhere, a precise statement of each of the steps involved in the creation of a regulation from inception to coming into force. We are, of course, aware of the general stages involved: perceived public need, internal formulation, informal consultation, drafting, publication and possible Board of Review procedures. However, I am concerned that unless we have a more specific description of the process, we may fail adequately to take into account possible factors of which we are presently unaware.

Would you, therefore, be kind enough to arrange for one of your officials to provide us with a memorandum documenting each step in the development of the PCB order up to the time a notice of objection was filed. We are familiar with subsequent steps as a result of our own experience and the very helpful presentation before us of Mr. Robinson. However, we would also appreciate a statement of the steps taken and to be taken following the PCB Board of Review's First Report.

With best wishes.

Yours sincerely,

  
Maxwell Cohen, Q.C.  
Chairman, PCB Board of Review



Ottawa, Ontario  
K1A 0H3

JUN 12 1980

Professor Maxwell Cohen  
Chairman  
PCB Board of Review  
1302 - 200 Rideau Terrace  
Ottawa, Ontario  
K1M 0Z3

Dear Professor Cohen:

I am writing in response to your letter of April 15 concerning the processes within Environment Canada and elsewhere within the Government which involve public consultation as a prelude to government decision-making in the environmental protection area. The Environmental Protection Service has prepared a detailed response to your first question dealing specifically with the consultative steps which have been taken in relation to the Environmental Contaminants Act. I have attached a summary of those consultations.

The Department does consult both formally and informally with many groups in the conduct of its work. Such consultations may take the form of meetings with interest groups, such as environmental organizations and other resource-oriented groups, to discuss issues or problems of mutual concern, or may extend to formal meetings such as those undertaken in accordance with Federal/Provincial Accords for the Protection and Enhancement of Environmental Quality which were signed five years ago with seven of the provinces.

... /2

- 2 -

The federal Environmental Assessment and Review Process (EARP) was established to ensure that environmental effects are taken into account as early as possible in federal programs, projects and activities. Federal agencies are obliged to screen their activities and if it is found that an activity may have significant adverse effects, it must be referred by the agency to the Federal Environmental Assessment and Review Office (FEARO) for a formal review by an independent Panel. A separate Panel is established for each project referred. After an environmental impact statement is prepared based on Panel guidelines, the document is subjected to full public review. Then, following a study of all the evidence presented, the Panel recommends to the Minister of the Environment the action that should be taken. The final decisions are made at the Ministerial level. I have included two publications on this subject which may be of interest to you.

Consultations also take place on an annual basis with some industrial associations such as the Petroleum Association for the Conservation of the Environment (PACE), the Canadian Chemical Producers Association (CCPA); the Canadian Manufacturing Association (CMA); and the Canadian Pulp and Paper Association (CPPA). These meetings are attended by various departmental officials, including the Assistant Deputy Minister and the Directors General of the Environmental Protection Service, as well as members of the Management Committees of the Associations. Items such as toxic chemicals; Socio-Economic Impact Analysis; long-range transport of air pollutants; public participation and confidentiality of information are discussed at these meetings. The process of regulation development has also traditionally involved formally constituted joint federal-provincial-industry task forces.

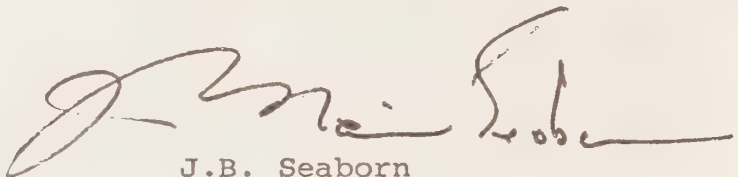
The Department has incorporated a socio-economic impact analysis (SEIA) policy into its decision-making process. As a result, regulations which could have an economic impact of ten million dollars in any given twelve-month period must undergo a full analysis. Such SEIA's are considered part of the consultation undertaken by Environment Canada.

- 3 -

In terms of formal consultative processes, I have enclosed a listing of these and a very brief description of their nature. I have also enclosed a copy of the Canada Water Act Annual Report which will provide you with information concerning the federal-provincial consultative arrangements dealing with water resource matters.

If additional information is required, please let me know.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'J.B. Seaborn', with a stylized, flowing script.

J.B. Seaborn



CONSULTATIVE PROCESSES WITH REGARD TO ENVIRONMENTAL PROTECTIONFederal-Provincial Committee on Air Pollution

This committee is composed of members from the federal and provincial governments and acts as a forum for the exchange of views on air pollution control and advises the Minister of Environment Canada on national air quality objectives. It has approved guidelines for an air quality index and for the siting of air monitoring stations.

Great Lakes Water Quality Board and its sub-committees

This committee is composed of members from the provincial and federal governments, and the United States. It acts as principal adviser to the International Joint Commission (IJC) with regard to the exercise of all the functions, powers and responsibilities (with the exception of research) assigned to the IJC under the Great Lakes Water Quality Agreement.

Great Lakes Science Advisory Board and its sub-committees

This committee is composed of members from the provincial and federal governments, and the United States. It acts as principal adviser to the International Joint Commission on research activities.

Offshore Labrador Biological Studies (OLAB)

This is an industry/government/community program designed to assess oil and gas development off Labrador.

Eastern Arctic Marine Environmental Studies (EAMES)

This is an industry/government/community program designed to fund and oversee biological studies in the Eastern Arctic.

Resource Management Environment Committee

This is an interdepartmental committee chaired by the Department of Energy, Mines and Resources which examines environmental issues pertaining to oil and gas development south of 60°.

Arctic Waters Advisory Committee

This is an interdepartmental environmental review committee chaired by the Department of Indian Affairs and Northern Development which examines environmental issues pertaining to oil and gas development north of 60°.

- 2 -

### Territorial Water Boards

These Boards have interdepartmental, territorial and private representation and provide for the licensing of water uses in the Territories, including withdrawal of pollution control.

### Advisory Group on Research and Development and Sub-Committee - Arctic Marine Oilspill Program Management Committee (AMOP)

This is an interdepartmental/industrial group which provides advice respecting oilspill countermeasures equipment research and development.

### National Environmental Emergency Team (NEET)

This is a federal/provincial/industry body designed to co-ordinate rapid response to environmental emergencies and a forum for consultations.

### Federal/Provincial/Industry Task Force on Hazardous Waste Definition

This is a temporary Federal/Provincial/Industry consultative unit with the objective of formulating a Canadian definition of a hazardous waste.

### Land Use Advisory Committee

This committee has interdepartmental and territorial representation and is chaired by the Department of Indian Affairs and Northern Development which provides advice on land use activities in the Northwest Territories and the Yukon Territory.

### Advisory Committee on Northern Development and Its Subcommittees

This committee is chaired by the Deputy Minister of Indian Affairs and Northern Development and has interdepartmental and territorial representation. It provides the interdepartmental consultative and planning medium for joint federal activities in Northern Canada.

### Regional Ocean Dumping Advisory Committee

This committee has interdepartmental representation (and territorial and provincial representation where necessary) and provides advice to the Regional Director of the Environmental Protection Service of this Department with regard to ocean dumping permit applications under the purview of the Ocean Dumping Control Act.

Consultation During the Implementation of the  
Environmental Contaminants Act

Section A describes the components of implementation of the Environmental Contaminants Act.

Section B lists the federal government committees and their role in implementation of the Act.

Section C lists formal consultations.

Section D gives examples of ad hoc consultations.

Section E describes some of the informal consultations.

International consultation is not covered.

## A Components

### The Environmental Contaminants Act

The implementation of the Environmental Contaminants Act can be thought of as a system with several functionally interdependent components. A substance that is to be assessed and controlled under provisions of the Act will progress through this system. A substance enters the system through the component known as the early warning system. Information on substances that trigger the early warning system is given a preliminary assessment to determine whether the compound warrants inclusion on the list of priority chemicals. This process of selecting substances for the list of priority chemicals is the second component of the system.

After the priority list has been prepared there is a need to know the extent to which the substance is used in Canada. This process of collection of commercial information on the substance forms the third component of the system. Because the substance is believed to pose a danger there is a need to collect information for a hazard assessment. This process is the fourth component of the system. If the hazard assessment shows that the substance poses a significant danger to human health or the environment a decision may be made to regulate the substance. The process of regulation development forms the fifth component of the system. The proposed regulation may cause undue hardship compared to its benefits, thus the socio-economic impact is assessed. The preparation of this assessment forms the sixth component of the system.

Publication of the proposed regulation in the Canada Gazette may result in a notice of objection from an interested party. The Minister of Environment and the Minister of National Health and Welfare must establish a Board of Review to inquire into the nature and extent of the danger. This is the seventh component of the system.

After promulgation of the regulation, information is needed to ensure that industry is in compliance with the regulation. The compliance and enforcement process forms the eighth component of the system. Even though industry has complied with the regulations the problem may not have been mitigated sufficiently. There is thus a need to assess the effectiveness of the regulations. This process forms the ninth and final component of the system.

#### B Federal Government Committees

1 DOE/NH&W Environmental Contaminants Committee. This Committee is responsible for establishing priorities for the investigation and control of environmental chemicals and for deciding such matters as what substances merit attention, what kinds of tests to perform, and what other information is required. It was formed to receive and assess information and, based on the extent of the danger perceived, to recommend to the Minister of the Environment whether prohibition or control was required, what control actions are required and the appropriate agency to impose restrictions.



## 2 Federal Interdepartmental Committee on Environmental Contaminants

This committee called FICEC ensures that economic, technological, social and geographic factors are taken into consideration before action is taken to schedule or regulate a substance. The offer to consult with departments or agencies of the Government of Canada is made through FICEC. (Paragraph 5(1)(b) of the Act).

## 3 DOE Environmental Contaminants Program Steering Committee

Because there are many administrative units concerned with environmental contaminanats within the Department of Environment this committee was formed to apply a systematic approach to planning integrated projects which reflect all components of the environment.

## 4 EPS Contaminants Working Group

This group composed of EPS regional and headquarters personnel acts as a liaison mechanism to integrate the work of regions and headquarters in implementing the environmental contaminants program through the Contaminants Control Branch at headquarters and through the Regional Environmental Contaminants Committees in the regions.

## C Formal Consultation

- 1 Consultation with provinces pursuant to paragraph 5(1)(a) of the Act.
- 2 Consultation with departments or agencies of the Government of Canada

pursuant to paragraph 5(1)(b) of the Act.

- 3 Consultation with a person who has filed a notice of objection pursuant to subsection 5(3) of the Act in order to determine whether the notice of objection is valid and whether the notice would be withdrawn if appropriate changes were to be made to the proposed regulation.
- 4 Environmental Contaminants Board of Review.
- 5 Canadian Council of Resource and Environmental Ministers. This council discusses and considers matters of general concern on which it would be desirable to cooperate.

#### D Ad Hoc Consultation

Ad hoc consultation takes place when the need arises. Two examples are described below.

##### 1 Polychlorinated Biphenyls

Early in 1978 it was decided to study the effect on users of the phase-out of the use of PCBs in transformers. An industry/government steering committee agreed to the terms of reference for this study and reached consensus on the conclusions and recommendations which appeared in the May 1978 report by M.M. Dillon.

##### 2 Chlorofluorocarbons (CFCs)

An industry/government task force composed of representatives of the producers and users and government met periodically during 1977 and 1978. Due in part to industry efforts and market place forces the 1977 consumption of CFCs for aerosol uses was cut to less than 50% of the 1974 consumption for those uses.

A joint industry/government workshop was held on September 20 and 21, 1978 to explore the ramifications of four possible regulatory alternatives. Industry was represented by packagers, marketers, suppliers and trade associations. The federal government was represented by persons from the department of Environment, National Health and Welfare, Agriculture, Consumer and Corporate Affairs, and Industry Trade and Commerce.

E Informal Consultation

- 1 Informal consultation takes place to some extent during each of the implementation components outlined in Section A.
- 2 Consultation takes place with organizations such as the National Indian Brotherhood, Canadian Manufacturers Association, and various trade associations.
- 3 EPS regions consult with the provincial departments of environment.

APPENDIX S

Letter from Mr. Joe Castrilli of the  
Canadian Environmental Law Association  
in the Globe and Mail, May 24, 1980





THE GLOBE AND MAIL - May 24, 1980

## Regulations committee problem is procedure

The letter by John R. Williams, Chairman of the Ontario Legislature's Standing Committee on Regulations (Ontario regulations are not "oversights" — May 10), while correcting some misunderstandings which appeared in an earlier Globe editorial (The lost arm of the law — April 3) is itself guilty of failing to deal with the crux of the issue regarding regulation-making.

Mr. Williams, in describing the current process of how regulations are reviewed, in effect "accentuated the positive, eliminated the negative," as the old song goes. The key problems with the committee's review procedure include the fact that it takes place after the regulation is already law and that it cannot delve into the merits or policy substance of the regulation.

In an environmental context this is especially disturbing because regulations are frequently the teeth — or in Ontario, the gums — of governmental control efforts. There is no mechanism whatsoever in Ontario environmental legislation requiring public scrutiny of the merits or likely effectiveness of proposed regulations before they become law. Nor is there a procedure whereby the individual can petition for needed regulations (we still have none for water pollution) or changes in existing ones when scientific studies or events (e.g. lead contamination) demonstrate a regulation's inadequacy.

Moreover, this problem is not limited to Ontario. There are at least 150 regulations under some 70 environment-related provincial statutes from British Columbia to Newfoundland. Yet not more than one or two of these statutes call for some type of public comment or review of draft regulations. Quebec's Environmental Quality Act is the principal exception to uniform silence on the role of the public — the presumed beneficiaries. Administrative discretion as to what, if any, public input will be allowed is the rule rather than the exception in most provinces.

What is needed is a mechanism or forum where the merits and policy substance of environmental regulations can be tested and necessary changes made before they become law. Until that is the case, and notwithstanding the valuable contributions of Mr. Williams' committee, there is little justification for the claim that the present system provides the necessary safeguards to protect the individual from potential executive abuse.

Joe Castrilli  
Canadian Environmental  
Law Association  
Toronto



APPENDIX T

Extract (p.47) from the  
Transcript of April 14, 1980



15 MR. CAVERLEY: I have always felt very keenly  
that we wanted to hear everything that had to be said about a  
project and I would not close off the hearing until I had  
heard it all and this led to certain repetition. Yes, but on  
the other hand, if you were sitting on the other side of the  
20 fence, and if you were these people and, you know, say a  
multi-million dollar corporation was moving in there to  
completely destroy your fabric or your way of life in your  
small community, you would feel very, very keen about it. I am  
thinking about some of these tremendous land fill sites, these  
30 big corporations, like Maple, for instance, or you know a big  
Chicago-based company coming in, you know, and just going to take  
over.























